# Petition

81-198

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# In the Supreme Court of the United States

**October Term, 1981**

INSURANCE COMPANY OF NORTH AMERICA,
*Petitioner,*

vs.

FORTY-EIGHT INSULATIONS, INC. and TRAVELERS
INDEMNITY OF RHODE ISLAND,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI
## To the United States Court of Appeals For the Sixth Circuit

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## QUESTIONS PRESENTED

1. Whether a federal court in the exercise of diversity jurisdiction, finding no state law directly in point as to which of several theories of coverage should be applied in interpreting standard insurance contracts, is free to develop what it thinks is the better or superior theory and then apply that theory vicariously as the controlling state law.

2. Whether a federal court in the exercise of diversity jurisdiction, in implementing what it thinks is the better or superior theory of coverage, is free to repudiate established state law regarding the burden of proving policy coverage in order to make the burden of proof more consistent with its theory of coverage.

3. Whether a disease caused by exposure to a deleterious substance like asbestos "occurs" for purposes of standard comprehensive insurance policies over the entire period of exposure to the agent causing the disease, or only when the disease is first diagnosed or otherwise manifests itself.

## LIST OF PARTIES

Petitioner Insurance Company of North America (hereinafter INA) was the sole plaintiff in the district court and an appellant in the Sixth Circuit. The defendants in the district court were Forty-Eight Insulations, Inc.; Affiliated FM Insurance Company; Illinois National Insurance Company; Travelers Indemnity of Rhode Island; and Liberty Mutual Insurance Company (hereinafter Forty-Eight, Affiliated, Illinois National, Travelers, and Liberty). Affiliated, Illinois National, and Liberty were appellants in the Sixth Circuit. Forty-Eight was an appellee and cross-appellant. Travelers was an appellee. Liberty is filing its own Petition for Writ of Certiorari in this proceeding and is a nominal respondent with respect to INA's Petition. A list of corporations affiliated with petitioner INA is attached as Appendix E, p. A84.

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## PETITION FOR A WRIT OF CERTIORARI
**To the United States Court of Appeals**
**For the Sixth Circuit**

## OPINIONS BELOW

The Sixth Circuit's opinion is reported at 633 F.2d 1212, was entered on October 21, 1980, and is annexed as Appendix A, p. A6. The Sixth Circuit's order on rehearing modifying its opinion is not officially reported, was entered on March 5, 1981, and is annexed as part of Appendix A, p. A1. The opinion of the United States District Court for the Eastern District of Michigan is reported at 451 F. Supp. 1230, was entered on May 4, 1978, and is annexed as Appendix B, p. A50.

## JURISDICTION

The judgment of the Sixth Circuit was entered on October 21, 1980, with one judge of the panel dissenting, Appendix A, p. A48. On March 5, 1981, petitions for rehearing were granted in part and otherwise denied, Appendix A, p. A1. On May 22, 1981, an extension of time in which to file this petition was granted by Justice Stewart to and including August 2, 1981. Jurisdiction to review the judgment is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, clause 1 of the Constitution of the United States provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Rules of Decision Act, 28 U.S.C. § 1652, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

## STATEMENT OF THE CASE

### A. Coverage Dispute.

Respondent Forty-Eight Insulations, Inc. (Forty-Eight) is a subsidiary of Foster Wheeler Corp. It is a manufacturing company located in Illinois which from 1923 through 1970 manufactured and sold various products which contained asbestos. Forty-Eight has been named as a defendant in thousands of lawsuits filed by claimants who allege that they, or their decedents, have contracted one or more diseases as the result of exposure to asbestos-containing products. Generally in these lawsuits plaintiffs contend that they have been exposed to the products of ten or more defendants, including Forty-Eight, over periods of from ten to thirty years or more.

Forty-Eight's liability in these product liability actions is not in issue here. Rather, the dispute in this case among Forty-Eight and several insurance companies is which of these insurers, if any, is obligated to defend and indemnify Forty-Eight in each of these underlying asbestos lawsuits.

Petitioner and the other insurance companies which are parties had issued standard comprehensive liability insurance policies to Forty-Eight which were in effect *seriatim* beginning October 31, 1955.

The rights and obligations of the parties are determined by their contracts of insurance. Each policy involved in the case contains language identical or similar to the following:

> [The insurer] will pay on behalf of the insured all sums which the insured shall be legally obligated to pay as damages because of . . . bodily injury or . . . property damage to which this policy applies caused by an occurrence.

* * * * *

> 'Bodily injury' means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom. 633 F.2d at 1216; App. A, p. A12.

Each policy at issue in this litigation thus provides that if a claimant's asbestos-related disease "occurs" during its policy period, then that insurer must defend and indemnify Forty-Eight with respect to that claim. If the disease occurs outside the policy period, then that policy provides no coverage with respect to that claim. This or similar language is contained in virtually all policies of comprehensive general liability insurance written throughout the United States since the 1940s, and the manner in which the policy language is construed to apply to asbestos-related claims will affect insurers and asbestos manufacturers not parties to this case.

The precise question in dispute is when asbestos-related diseases "occur." The Sixth Circuit acknowledged that the question is difficult and that it has "split the American insurance industry," App. A, p. A7. The answer urged by the petitioner is that disease occurs at the time it first produces signs or symptoms which can be detected by the claimant or his physician (that is, when it manifests itself). This is known as the "manifestation" theory of coverage. The manifestation interpretation is the traditional interpretation or approach adopted by courts throughout the country in determining when disease occurs in a variety of analogous contexts.

The alternative, embraced by the courts below, is the "exposure" theory of coverage. The exposure theory views each asbestos-related disease as the sum total of a series of microscopic insults to the lung. Under this theory, each asbestos fiber which lodges in a claimant's lungs constitutes a discrete "injury" which invokes insurance coverage. Under the exposure theory, every asbestos-related disease "occurs" over the entire course of the claimant's exposure to asbestos (which is often more than 30 years), irrespective of when signs or symptoms of the disease first develop.

The practical effects of the two theories vary greatly. Under the manifestation theory, the administration of individual lawsuits is simple and straightforward because only the insurer providing coverage at the time the claimant's disease first becomes manifest is obligated to defend the insured and to pay any judgment or settlement with respect to that claim. Under the exposure theory, the administration of these lawsuits is complex and cumbersome because all insurers providing coverage during any portion of the claimant's period of exposure are obligated to participate in the defense and indemnity of the insured. Under the exposure theory, in each case the insurers must coordinate their efforts in the defense of the insured and must devise some mechanism to prorate the costs of defense and indemnity. The thousands of individual asbestos lawsuits, each involving multiple defendants, make this task exceedingly difficult.

## B. Proceedings in District Court.

Petitioner Insurance Company of North America (INA) filed this declaratory judgment action in the United States District Court for the Eastern District of Michigan on July 6, 1977, invoking jurisdiction by reason of diversity of citizenship of the parties. See 451 F. Supp. at 1230, App. B, p. A51.

Named as defendants were respondent Forty-Eight, which had purchased insurance from INA from 1955 to 1972, and the four other insurance companies which had provided primary insurance to Forty-Eight *seriatim* since 1972.* The complaint recited the controversy among the parties concerning policy interpretation and requested the court to declare that coverage for a claim for asbestos-related disease is provided only by the insurance policy in effect at the time the particular disease was or should have been known to the claimant, or was medically diagnosed, whichever comes first. Affiliated, Illinois National, and Liberty also urged that the manifestation interpretation be adopted.

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*The other insurers and their periods of coverage are: Affiliated FM Insurance Company (11/31/72 to 1/10/75), Illinois National Insurance Company (1/10/75 to 1/12/76), Travelers Indemnity of Rhode Island (1/12/76 to 11/8/76), and Liberty Mutual Insurance Company (11/8/76 to 1/1/78). Forty-Eight either had or could prove no insurance earlier than 1955.

Forty-Eight filed a counterclaim seeking declaratory judgment with respect to the coverage issue. Forty-Eight contended that coverage is triggered by a claimant's exposure to asbestos-containing products and that all carriers "on the risk" during the time a claimant was exposed to asbestos must defend and indemnify Forty-Eight completely with respect to that claim, irrespective of when the claimant's disease first became manifest. Travelers urged adoption of a variation of the exposure interpretation.

A bench trial was held on February 8 and 9, 1978. The evidence (by way of depositions and live testimony) focused upon the development of the three most common asbestos-related diseases, namely mesothelioma, bronchogenic carcinoma, and asbestosis. Both mesothelioma and bronchogenic carcinoma are malignant diseases. Mesothelioma afflicts the mesothelial cells which line the chest wall and surround the heart, lungs, and other organs of the body cavity. Bronchogenic carcinoma is cancer of the lung. While not malignant, asbestosis is a chronic, fibrotic condition of the lungs which can develop after many years of excessive exposure to asbestos fibers.

With respect to the two malignant diseases, the district court found that signs or symptoms develop within a short time after the malignant tumor's inception, that both are subject to a prompt diagnosis, and that both usually cause death within a few years from the time the tumor initially developed. The district court found that asbestosis results from the inhalation of asbestos fibers over a considerable period of time, that asbestos can cause a fibrotic process to take place within the lung, and that in those instances where the disease does develop, symptoms do not develop until 20 years or more after the initial exposure to asbestos. 451 F. Supp. at 1236-1237; App. B, pp. A59-A61.

The district court was confronted with a clear legal choice in determining the coverage provided by these standard insurance policies in connection with asbestos-related diseases: is the contract language to be interpreted to provide coverage each time a person is exposed to asbestos, or only when the asbestos-related disease first manifests itself? To resolve that question in a diversity action, a federal court must (1) choose the applicable state law, and (2) apply that law as the state courts in that jurisdiction would apply it. The district court below, sitting in Michigan, performed its task in the following manner:

(1) "In a contract diversity action such as this, Michigan conflict of law rules require the application of the law of the place where the insurance policies were issued and countersigned." *Id.* at 1237; App. B, pp. A61-A62.

(2) The parties in this case "agree that Illinois law applies to the interpretation of all the policies except the Liberty Mutual policies, which are governed by New Jersey law." *Id.* at 1237; App. B, p. A62.

(3) Several general principles of contract construction were then noted: "The law of both states holds that where the terms of an insurance contract are clear and unambiguous, they must be given their common and ordinary meaning. [Illinois and New Jersey citations omitted]. In

both states insurance contracts are to be liberally construed in favor of the insured and against the insurer. [Illinois and New Jersey citations omitted]. If there are ambiguities in the policy, or uncertainty over its interpretation, the policy is to be construed against the insurer, and in favor of the insured. [Illinois and New Jersey citations omitted]." *Id.* at 1237-1238; App. B, p. A62.

(4) Although purporting to interpret the uniform policy language in light of these general principles of Illinois and New Jersey law, the district court made no attempt to determine how the state courts in these two jurisdictions would likely apply such principles to the interpretative problem at hand. Apparently the district court could find no Illinois or New Jersey decisions on point, not even by way of analogy. Not a single court decision from either state was cited in support of the ultimate conclusion that "The language of the various policies, the medical evidence as to bodily injury, and the reality of joint and several liability in the underlying lawsuits combine to mandate the adoption of the exposure theory of coverage." *Id.* at 1242; App. B, p. A72.

(5) Finally, the district court applied its exposure formula for apportioning costs of indemnity among Forty-Eight and its insurers to defense costs as well. The apportionment of defense costs is correct if the exposure theory of coverage is correct, but this conclusion was reached without any specific determination that Illinois and New Jersey courts would do likewise.

### C. Proceedings in the Sixth Circuit.

In a two to one decision, the Sixth Circuit affirmed the district court's selection of the exposure theory. Although the Sixth Circuit acknowledged that "we must apply Illinois and New Jersey law," it made no attempt to determine how the courts of those states would likely address and resolve the novel and nationally important problem of insurance coverage in connection with asbestos-related litigation.

The Sixth Circuit rejected extensive case law supporting the manifestation theory, including Illinois and New Jersey precedents. Many of these precedents were cited in dissent by Judge Merritt, who described the exposure theory as being "at odds with insurance and tort law and fairness," 633 F.2d at 1229; App. A, p. A41. Rather than utilizing these decisions, the majority opinion made its own subjective analysis of the competing theories and concluded that:

> In sum, *we think that the exposure theory* adopted by Chief District Judge John Feikens *is the superior interpretation of the contract provisions. Id.* at 1223; App. A, p. A28 (emphasis added).

The Sixth Circuit confessed that the problem of interpretation posed by this case was not only "one of first impression for an appellate court" but also an "impossible" one that has "no truly satisfactory solution." *Id.* at 1223 and 1226; App. A, pp. A27 and A34. Although the court expressed determination "not [to] rely on judicial fiat" in trying to find a solution, *Id.* at 1222; App. A, p. A26, it based its selection of the exposure theory on little more than its own judicial preferences, beliefs, and thoughts. Rather than finding how Illinois and New Jersey courts would probably resolve the controversy, the Sixth Circuit's opinion is studded with such statements as:

> *Because of policy considerations* and because of the medical testimony, *we do not find controlling the analogous insurance cases* urged upon us by appellants. *Id.* at 1220; App. A, p. A21 (emphasis added).

> *We think that a better view* is that the contractual terms in issue here . . . are inherently ambiguous as applied to the progressive disease context before us. *Id.* at 1222; App. A, p. A26 (emphasis added).
>
> As can be seen, in this case there is considerable dispute as to when an injury from asbestosis should be deemed to occur. For this reason, *we can apply* the above-stated canons of construction and resolve doubts in favor of maximizing coverage. *Id.* at 1222; App. A, p. A26 (emphasis added).
>
> Aside from this, however, *we believe that the policy language itself is best construed* along the lines of the exposure theory. *Id.* at 1222; App. A, p. A26 (emphasis added).
>
> *We do not find persuasive* appellants' contention that 'bodily injury' means 'compensable bodily injury.' *Id.* at 1222-1223; App. A, p. A27 (emphasis added).
>
> 'Bodily injury' *should be construed* to include the tissue damage which takes place upon initial inhalation of asbestos. That is both a literal construction of the policy language and the construction which maximizes coverage. It is also the construction which, *we think,* best represents what the contracting parties intended. *Id.* at 1223; App. A, pp. A28-A29 (emphasis added).

Before concluding that "we think that the exposure theory adopted by Chief District Judge John Feikens is the superior interpretation of the contract provisions," the Sixth Circuit inserted one additional thought respecting the duty to apply Illinois and New Jersey law. Without elaboration or citation, the Sixth Circuit stated,

> *We think* that Illinois and New Jersey courts would try to construe the contract language to embrace the exposure theory. *Id.* at 1222; App. A, p. A25 (emphasis added).

For aught that appears, the Sixth Circuit's opinion reflects only what it deems proper and fair, not what Illinois or New Jersey courts would hold proper and fair.

In one important particular, moreover, the Sixth Circuit deliberately rejected Illinois and New Jersey law. In footnote 27 of the majority opinion, 633 F.2d at 1225-1226; App. A, p. A33, in the course of discussing prorationing under the exposure theory, the court conceded that the law in Illinois and New Jersey is that the burden of proof to establish coverage under an insurance contract rests upon the insured, *i.e.*, on Forty-Eight. But the court thought it might be difficult for Forty-Eight to meet that burden under the exposure theory. It therefore abandoned the Illinois and New Jersey rule and placed the burden of proof on the insurer. In the court's words,

> Because of these unique circumstances, we think it appropriate to presumptively view *each* manufacturer as being on the risk for each of the years in which a worker was exposed to asbestosis. If an insurance company can show that a certain manufacturer's products were not or could not have been involved for certain years, it will be absolved from paying its prorata share for those years. Given the impossibility in most cases of ascertaining which company provided asbestos products in different years, *we think that this is the fairest way to apportion liability. Thus, we simply reverse the ordinary burden of proof and place it on the insurer.* We are keenly aware of the need to apply a straightforward formula and not

one which will lead to additional litigation. *Id.* at 1226, n. 27; App. A, p. A33 (emphasis added).

Circuit Judge Merritt, in dissent, rejected both the manifestation theory and the exposure theory. He advocated adoption of a third theory of his own invention, which he termed "the discoverability rule." That rule, which has no basis in Illinois or New Jersey law, is concededly arbitrary and was offered by Judge Merritt as a compromise.

In its original opinion, the Sixth Circuit limited its discussion of the exposure theory to claims involving asbestosis without indicating whether that rule would also apply to malignant diseases. See *Id.* at 1214, n.1; App. A, p. A8. When this was brought to the court's attention on petitions for rehearing, the Sixth Circuit responded with a short opinion which modified the original opinion and held that asbestos-related cancers should be treated exactly like asbestosis.

In extending the exposure theory to asbestos-related cancers, the Sixth Circuit relied primarily on "policy grounds," augmented by a bit of medical testimony. The court cited no controlling state law on this matter but merely relied on the belief that treating the cancers differently from asbestosis "would needlessly complicate settlement and defense of the individual lawsuits" and would "create more difficulties for the parties than already exist in this complicated case." See App. A, p. A3.

In all other respects, the petitions for rehearing were denied, including the suggestion for a rehearing en banc of the entire proceeding.

## REASONS FOR GRANTING THE WRIT

### A. This Is an "Exceptional" Diversity Case Warranting Plenary Review by This Court.

This Court has consistently held that "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). This is one of those rare "exceptional cases."

The case is exceptional, as discussed hereinafter, in terms of its impact on the administration and execution of federal diversity jurisdiction, particularly with reference to the delicate function of federal diversity courts in developing and applying state common law in areas never before addressed by state courts. The case is even more exceptional in terms of the impact that the ruling on the merits will have upon the nation's legal system and upon large segments of American industry. It will be important precedent in both asbestos litigation and other litigation that will arise in the future involving diseases caused by long-term exposure to drugs, chemicals, and other toxic substances.

Asbestos litigation poses a problem of unprecedented magnitude. As noted by the Sixth Circuit, there has been "an avalanche of lawsuits filed against the entire asbestos manufacturing industry." 633 F.2d at 1215; App. A, p. A10. These lawsuits constitute the largest, and potentially most costly, block of products liability claims ever to confront American industry. N.Y. Times, July 3, 1981, § 1, at 1, col. 1. The sheer volume of these lawsuits threatens to bring the American judicial system to a standstill. It is estimated that 12,000 such lawsuits have been filed in federal and state courts throughout the United States and that the number of new lawsuits is increasing at the rate of 400 per month. N.Y. Times, July 3, 1981, §1, at 1, col. 1. As many as 2,000 lawsuits are pending in California alone. Bests Insurance Management Reports, April 6, 1981, at 1. In *Migues v. Nicolet Industries,* 493 F. Supp. 61, 64 (E.D. Tex. 1980), the court stated "The number of asbestos-related cases in this district alone is quite dramatic. At the most recent count, 2,445 plaintiffs had claims against all or some of the same manufacturers named in this suit."

The coverage dispute encompasses every level of insurance coverage (primary, excess, and reinsurance) and has "split the American insurance industry" 633 F.2d at 1214; App. A, p. A7. The orderly and efficient administration of these thousands of asbestos-related claims has become exceedingly difficult because of the irreconcilable dispute among the insurance companies as to the proper coverage interpretation. The resolution of the coverage question will have important practical consequences with respect to all of these asbestos lawsuits because it will determine responsibility for the administration, defense, settlement, trial, and appeal of these suits against asbestos manufacturers. The importance of the issues presented in this lawsuit is demonstrated by the fact that nine *amici curiae* briefs were filed with the Sixth Circuit.

Litigation involving the coverage dispute itself has assumed immense proportions. In addition to this action, there are 22 other declaratory judgment actions involving other asbestos manufacturers. A list of these actions, involving a total of 127 parties, is set forth on Appendix C, p. A80. These other actions present the very issue involved here, namely the interpretation of standard comprehensive policies of insurance used throughout the country in the context of asbestos litigation. Utter chaos will result if these actions produce contrary interpretations of the same policy language.* A prompt and uniform resolution by this Court of the fundamental coverage question is urgently needed so that the parties and the courts can focus their attention and resources on disposition of the thousands of underlying asbestos cases.

The importance of this coverage issue is not limited to asbestos litigation. The insurance policies in issue here are standard policies used now and for many years before throughout the country by virtually the entire insurance industry. More importantly, these policies are "general" or "comprehensive" liability policies which provide coverage for claims arising from all types of products, not just for asbestos-containing products. The very same coverage dispute has already arisen in connection with cancers caused by diethylstilbestrol (DES) and other drugs, and asbestos litigation is likely the harbinger of generations of future litigation involving diseases caused by exposure to chemicals and other toxic substances. *Cf. Suits That Are Searing Asbestos*, Business Week, April 13, 1981. This decision will likely determine the manner in which insurance policies must respond to such claims and thus is of great importance to many industries and businesses not involved in asbestos litigation.

To repeat, this is an "exceptional" case warranting plenary review by this Court.

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*Decisions on this issue have been rendered in only two other cases. On April 8, 1981, the Fifth Circuit reversed the district court and adopted the Sixth Circuit's opinion in this case without independent evaluation. *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981). The United States District Court for the District of Columbia did the same thing in *Keene Corp. v. Insurance Co. of North America*, 513 F. Supp. 47 (D.D.C. 1981). The *Keene* ruling is before the United States Court of Appeals for the District of Columbia Circuit pursuant to interlocutory appeals under 28 U.S.C. § 1292(b). Oral argument was held on June 16, 1981.

### B. The Decision Below Creates Important Problems in the Administration of Federal Diversity Jurisdiction.

The endeavor of the courts below to discover the applicable common law of Illinois and New Jersey generates critical and unique problems in the implementation of the principle embodied in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). How is a federal court to determine the applicable substantive law of a state when there appears to be no state law on the particular point involved?

To answer that core question, one must also ask and answer additional questions. Where there is no controlling state law, is the federal court free to determine what it thinks is the better, the superior, the more practical rule of law and then simply guess that the state courts would follow such a rule? Can such a guess or prediction be trustworthy when it is made by federal judges with respect to the laws of states outside their judicial circuit? Can federal judges sitting within the Sixth Circuit be considered sufficiently "familiar with the intricacies and trends of local law and practice" in Illinois and New Jersey, *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944), to permit the deference this Court normally gives to the determinations of state law made by federal judges presumably versed in state law jurisprudence? A negative answer to this last question seems mandated by *Lehman Brothers v. Schein*, 416 U.S. 386 (1974).

The *Erie* obligation was clearly understood by both courts in this case. It is to determine the Illinois and New Jersey common law governing the choice between the exposure theory and the manifestation theory in the novel context of determining insurance coverage for asbestos-related diseases. It was their "belief" that the law of both states prefers the use of the exposure theory. They reached this conclusion in the following manner:

(1) The federal courts found, to no one's surprise, that Illinois and New Jersey courts follow certain universal principles of construction when interpreting insurance contracts;*

(2) They then proceeded to use those principles of construction as stepping stones to an independent federal inquiry into the merits, policies and practicalities of the opposing theories of coverage, resulting in a federal determination that the exposure theory "is the superior interpretation of the contract provisions;" and

(3) The federal courts then elevated this federal preference for the exposure theory into the common law jurisprudence of Illinois and New Jersey by the expedient of an *ipse dixit* uttered by the Sixth Circuit: "We think that Illinois and New Jersey courts would try to construe the contract language to embrace the exposure theory."

Within that progression of state law determination lie the *Erie* problems that deserve and indeed require plenary review of the Sixth Circuit's ruling. Its pursuit of its *Erie* obligation, like that of the district court, falters in two highly significant respects. First, the patent efforts of both courts below to develop what they as federal courts deem to be the preferable or "superior" rule for interpreting the contract language are impermissible. If *Erie* means anything, it means that a federal court must determine what the state law is, rather than finding and prescribing for the state "a different rule, however superior it may appear."

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*But the courts below did not say, nor could they say, that the mere existence of those universal canons of construction in the jurisprudence of Illinois and New Jersey convincingly demonstrates that the courts in those states would likely apply those principles in such a way so as to adopt the exposure theory.

*West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237 (1940).*

Second, this endeavor to find and identify the relevant law of Illinois and New Jersey, in the absence of state court precedent, is misguided and inadequate. It simply will not do to make a federal inquiry as to the "superior" rule of law and then to guess or "believe" that the state courts will likely adopt that superior rule. Where there are no state court precedents, this Court has mandated in *West* that it is the federal court's duty "in every case to ascertain from all available data what the state law is and apply it." *Id.* at 237.

Understandably, in the absence of established state law, educated estimates and predictions "are necessarily often all that federal courts can make in ascertaining what the state court would rule to be its law." *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 at 209 (1956) (Frankfurter, J., concurring). Here, of course, we have no estimates or beliefs uttered by judges presumed to be familiar with the Illinois or New Jersey jurisprudence. But the most educated estimates are trustworthy precisely because they are based on something more substantial than a mere belief or hope. They are based, in other words, on what *West* termed "all available data" from which the common law grows and develops.**

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*Equally impermissible is the Sixth Circuit's intentional refusal to follow established Illinois and New Jersey law regarding the insured's burden of proving coverage. That refusal, which is encompassed by the second question presented herein is discussed more fully in the petition for certiorari being filed in this case by Liberty Mutual Insurance Company.

***See generally*, Corbin, *The Laws of the Several States*, 50 YALE L. J. 762 (1941); Gibbs, *How Does the Federal Judge Determine What is the Law of the State?*, 17 SO. CAROLINA L. REV. 487 (1965); Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L. J. 187 (1957); Cardozo, *Choosing and Declaring State Law: Deference to State Courts Versus Federal Responsibility*, 55 NW. L. REV. 419 (1960).

As Professor Wright has written with respect to this problem,

> In vicariously creating law for a state, the federal court may look to such sources as the Restatements of Law, treatises and law review commentary, and 'the majority view.' The federal court must keep in mind, however, that its function is not to choose the rule that it would adopt for itself, if free to do so, but to choose the rule it believes the state court, from all that is known about its methods of reaching decisions, is likely in the future to adopt. C. WRIGHT, FEDERAL COURTS, 270-271 (3d ed. 1976).

In other words, the "all available data" referred to in *West* does not mean all the data a federal court might be free to use were it formulating its own rule of decision. What it does mean is "all the data the highest court of the state would use in an effort to determine how the highest court of the state would decide." C. WRIGHT, FEDERAL COURTS, 269 (3d ed. 1976). And that is how all courts of appeals, prior to the Sixth Circuit's ruling in this case, have interpreted and followed the *West* "all available data" mandate. See particularly the opinion of Judge (now Justice) Stevens for the Seventh Circuit in *Gates Rubber Co. v. USM Corp.*, 508 F.2d 603, 606-615 (7th Cir. 1975).*

The Sixth Circuit's ruling in this case needs review and correction if the *Erie* obligation is to be enforced in this growing area of federal diversity jurisdiction. Left unreviewed, the ruling can become an ill-advised precedent allowing federal courts to devise a hybrid of federal common law, a "federal diversity common law," for use in

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**See also, Kline v. Wheels By Kinney, Inc.*, 464 F.2d 184, 187 (4th Cir. 1972); *Glassman Construction Co. v. Fidelity Co.*, 356 F.2d 340, 342 (D.C. Cir. 1966); *Patch v. Stanley Works*, 448 F.2d 483, 487 (2d Cir. 1971); *Gates v. P. F. Collier, Inc.*, 378 F.2d 888, 892-3 (9th Cir. 1967).

federal court development of some of the uncharted areas of the common law of the 50 States. Such a development would severely impugn the integrity of *Erie* and would strain the fragile relationship between state and federal courts regarding development of state substantive law.

One consequence of this *Erie* misadventure has been to render askew the appellate review process in this case. The appeal before the Sixth Circuit and certiorari proceedings before this Court should have been limited to a review of the district court's determination as to the proper theory of coverage required by Illinois and New Jersey law. But here, the district court, while paying lip service to its *Erie* obligation, made its own independent choice of the proper coverage theory. The Sixth Circuit, while likewise acknowledging its *Erie* obligation, also made its own independent choice of the proper coverage theory as well as approving the district court's choice.

At this late juncture, this Court is given little choice but to determine which theory of coverage the courts of Illinois and New Jersey would likely select or to review the merits of the theory chosen by the Sixth Circuit. Neither certification nor abstention, *Cf.*, *Lehman Brothers v. Schein*, 416 U.S. 386, 389-390 (1974), is appropriate here. Certification is unavailable in either state, and the problem is too urgent and important for abstention at this late date.

Review by this Court of the Sixth Circuit's ruling is necessary.

## C. The Decision Below Raises a Substantial Question As to Whether Illinois and New Jersey Courts Would Select the Exposure Theory of Coverage in Determining When Disease "Occurs."

Critical to the Sixth Circuit's decision is the statement: "We think that Illinois and New Jersey courts would try to construe the contract language to embrace the exposure theory," 633 F.2d at 1222; App. A, p. A25). The validity of this assertion is doubtful. Proper discharge of the *Erie* obligation, including exploration of "all available data" as required by *West*, leads to the conclusion that Illinois and New Jersey courts would likely adopt the manifestation rule if confronted with this question of contract interpretation. Not only is support for the manifestation rule established in the decisions from both states, but the manifestation rule is also the majority rule established throughout the country in analogous contexts. No reason exists to believe that this case would cause Illinois or New Jersey courts to overrule or abandon it.

Illinois and New Jersey courts have determined in analogous situations that diseases occur at the time of their first manifestation. A uterine tumor was held to occur upon manifestation for purposes of health and accident insurance in *Craig v. Central National Life Insurance Co.*, 16 Ill. App. 2d 344, 148 N.E.2d 31 (1958); *Broccolo v. Horace Mann Mutual Casualty Co.*, 37 Ill. App. 2d 493, 186 N.E.2d 89 (1962), reached the same conclusion with respect to a nonmalignant gynecological disease; in the same context *Kissil v. Beneficial National Life Insurance Co.*, 64 N.J. 555, 319 A.2d 67 (1974), held that cystic fibrosis occurred at the time of first manifestation. In *Nolan v. Johns-Manville Asbestos & Magnesia Materials Co.*, 85 Ill. 2d 161 (1981), a cause of action for asbestosis itself was held to accrue for purposes of the statute of limitations upon discovery of the disease, not upon exposure to asbestos.

Although the Sixth Circuit did not find these decisions instructive, courts in Illinois and New Jersey would likely find them persuasive.

Without reference to the law of either state, the Sixth Circuit concluded that a "cumulative disease" like asbestosis should be treated by "special rule," 633 F.2d at 1219; App. A, p. A18. Without support from decisions of either state or any other state, the Sixth Circuit held that injury in an asbestos claim "should be construed to include the tissue damage which takes place upon initial inhalation of asbestos," irrespective of when actual damages occur, *Id.* at 1223; App. A, p. A29.

Precisely the opposite conclusion was reached in *Jeffrey v. Chicago Transit Authority,* 37 Ill. App. 2d 327, 185 N.E.2d 384 (1962), which held that no injury occurred under Illinois tort law unless actual damages can be demonstrated. Applying that decision to asbestos, under Illinois law asbestos-related disease does not "occur" until actual, compensable damages exist. The Sixth Circuit's reply to this very argument was, "We do not find [it] persuasive," 633 F.2d at 1222; App. A, p. A27. That reply does not satisfy a federal court's *Erie* obligation.

If presented with this issue, in addition to relying on decisions from their own jurisdictions, it is likely that courts in Illinois and New Jersey would look to precedent from other jurisdictions in order to determine when disease occurs. Illinois law is "well settled that contracts of insurance . . . are to be taken and understood in their plain, ordinary, and popular sense," *Rubenstein v. Fireman's Fund Insurance Co.,* 339 Ill. App. 404, 90 N.E.2d 289 (1950). New Jersey law agrees, *Wilkinson & Son, Inc. v. Providence Washington Insurance Co.,* 124 N.J. Super. 466, 307 A.2d 639 (1973). Because the plain and ordinary meaning, the "popular sense," of when diseases occur has been established in decisions from many jurisdictions and in many contexts, it is likely that Illinois and New Jersey courts would find such precedent instructive and controlling in determining when asbestos-related diseases occur.

Most prominent among these decisions is *Urie v. Thompson,* 337 U.S. 163 (1949), in which this Court selected the manifestation theory and rejected the exposure theory would find such precedent instructive and controlling in determining when asbestos-related diseases occur.

under the limitation section of the Federal Employers' Liability Act, and this Court concluded,

> [We cannot] accept the theory that each intake of dusty breath is a fresh 'cause of action,' 337 U.S. at 170.

Quoting with approval from a state decision adopting the manifestation rule, this Court's opinion continues,

> '. . . consequently the afflicted employee can be held to be "injured" only when the accumulated effects of the deleterious substance manifest themselves. . . .' [Citation omitted]. The quoted language, used in a state workmen's compensation case, seems to us applicable in every relevant particular to the construction of the federal statute of limitations with which we are here concerned. *Id.*

Similarly, in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d. Cir. 1955), *cert. denied*, 350 U.S. 913 (1955), the manifestation rule was applied to the limitation provision of the Longshoremen's and Harbor Workers' Compensation Act, with the court writing at 225 F.2d at 143, "The Supreme Court has recognized the absurd effects which would result from the application of [an exposure] rule in occupational disease cases." The holding of *Cardillo* was reaffirmed in *General Dynamics Corp. v. Benefits Review Board*, 565 F.2d 208 (2d Cir. 1977).

In reviewing precedent from other jurisdictions, an Illinois or New Jersey court would find that the Sixth Circuit's decision here conflicts with decisions reached by federal courts in determining when asbestosis occurs for purposes of the statute of limitations of various states: *Karjala v. Johns-Manville Products Corp.*, 523 F.2d 155 (8th Cir. 1975) and *Clutter v. Johns-Manville Sales Corp.*, 646 F.2d 1151 (6th Cir. 1981). *Clutter* is of particular importance because the Sixth Circuit's judgment in it was rendered only one month after its rehearing order in this case. Its decision in *Clutter* is totally at odds with its decision here. In *Clutter*, the Sixth Circuit held that asbestosis occurs under Ohio's statute of limitations not upon exposure, but when the disease becomes manifest. After a thorough review of state law (which was not undertaken in this case), the Sixth Circuit wrote, "the injurious exposure did not cause contemporaneous injury, but rather set forces in motion which later manifested themselves in asbestosis," 646 F.2d at 1157.*

Illinois and New Jersey courts would likely be influenced by numerous decisions by courts from other states which (like courts in Illinois and New Jersey) adopted the manifestation rule in cases arising under health and accident insurance policies.** The Sixth Circuit conceded that these cases "certainly appear to provide support for the manifestation theory," 633 F.2d at 1221; App. A, p. A24, but refused to be guided by them in determining when disease occurs.

The reason that manifestation is the majority rule as respects when disease occurs is succinctly summarized in *Grain Handling Co. v. Sweeney*, 102 F.2d 464, 466 (2d Cir.), *cert. denied*, 308 U.S. 570 (1939), in which Judge Learned Hand wrote,

> [A] disease is no disease until it manifests itself. Few adults are not diseased, if by that one means only that the seeds of future troubles are not already planted . . .

Similarly, Illinois and New Jersey courts would likely be influenced by the numerous decisions adopting the manifestation rule in the analogous context of determining when property damage occurs. The Sixth Circuit simply relegated these decisions to a footnote.*

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*Numerous state courts have also adopted the manifestation rule in determining when asbestos-related diseases occur for purposes of the statute of limitations. These decisions are cited by the Sixth Circuit at 633 F.2d 1220, n.13; App. A, pp. A21-A22.

**See the majority's citation of these cases at 633 F.2d 1221, n.17; App. A, p. A28; and the dissent's discussion at 633 F.2d 1229; App. A, pp. A42-A43.

The overwhelming precedent supporting the manifestation theory prompted the Sixth Circuit to write, "We concede that appellants have a good argument," 633 F.2d at 1218; App. A, p. A17; and to confess "there are solid arguments to support the manifestation theory," *Id.* at 1219; App. A, p. A20. The Sixth Circuit's rejection of each category of decisions supporting manifestation was premised not upon contrary case law, nor upon a finding that Illinois and New Jersey courts would likely reject the cases, but upon the Sixth Circuit's own perception that policy considerations require that the cases be ignored.

The Sixth Circuit's discussion of policy considerations is a prime example of its failure to satisfy its duty under *Erie*. The only "policy" cited by the court are the generalities of construction followed by Illinois and New Jersey courts—and by courts everywhere—that ambiguous or doubtful language in an insurance policy is construed in favor of the insured and against the insurer. *Id.* at 1219; App. A, pp. A20-A21. No one disagrees with this hornbook rule, but the rule is not the applicable state law which must be found in this case. The word "occur" is not ambiguous, nor is it the "policy" of Illinois or New Jersey to treat it so.

The Sixth Circuit does not even endeavor to explain why New Jersey and Illinois courts would resort to such generalities of construction in their consideration of this case. If the issue is when disease occurs, and if the manifestation theory embodies the ordinary and popular sense of when disease occurs, and if Illinois and New Jersey courts have determined in similar contexts that disease occurs upon manifestation, there is no need for such construction. Admittedly, the Sixth Circuit perceived a need for construction, but it provided no authority or rationale to support its conclusion that the state courts would likely reach the same conclusion.

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*See 633 F.2d at 1222, n.18; App. A, p. A25; and the dissent at 633 F.2d 1229; App. A, p. A47.

Even assuming that Illinois and New Jersey courts would analyze "policy considerations" if presented with this question of contract interpretation, the Sixth Circuit's policy analysis is woefully incomplete. General rules of construction do not embody all policy considerations important to a state, and the Sixth Circuit's selection of the exposure theory is in obvious conflict with at least several announced policies of Illinois law.

Its decision conflicts with Illinois decisions (discussed *supra* at page 21 of this petition) which determined diseases occurred for purposes of health and accident policies when they manifested themselves. In addition, Illinois' statute of limitation cases reflect a policy of treating claims for personal injury, including claims for asbestosis, as accruing when injuries become manifest and discovered, not when negligent conduct occurs, *Williams v. Brown Manufacturing Co.*, 45 Ill. 2d 418, 261 N.E.2d 305 (1970); *Lipsey v. Michael Reese Hospital*, 46 Ill. 2d 32, 262 N.E.2d 450 (1970); *Nolan v. Johns-Manville Asbestos, supra.* Similarly, to ease the burden of claims administration the Illinois' workmen's compensation statute selects as a matter of policy one and only one employer to bear the responsibility for an employee's asbestosis claim, even though the disease may have been caused by exposure during many different employments. 633 F.2d at 1221, n. 16; App. A, p. A23 citing Ill. Rev. Stat. ch. 48, § 172.36(d) (1975); App. D, pp. A82-A83. The exposure theory requires several insurers and the insured to share responsibility for a single claim. It thereby clashes with Illinois' announced policy for administering claims, while the manifestation rule would not. Finally, it is surely not the policy of Illinois and New Jersey to treat casually the burden of proof established by state law, and it is unlikely that courts of either state would *sua sponte* reverse the burden of proof in order to accommodate the exposure theory.

Resolution by this Court of the manifestation-exposure dispute is fully justified by the exceptional nature of this case. The controversy over when a disease caused by exposure to a substance like asbestos legally "occurs" is an issue which deeply permeates our national legal fabric. The debate is not confined to the insurance industry and the interpretation of the standard general comprehensive liability policy, important though that question may be. The issue is embedded in such legal areas as limitations law, workmen's compensation law, health benefits law, contract law, and tort law. Thus, when the Sixth Circuit selects the exposure theory under the rubric of the *Erie* doctrine, it can influence other legal areas, some of which stem from federal statutes, dealing with the problem. Likewise, the propriety of the Sixth Circuit's choice can be measured against precedents established in these other areas of the law, precedents which the Illinois and New Jersey courts would likely follow.

In sum, the choice made here by the Sixth Circuit carries with it no assurance that it is the choice Illinois and New Jersey courts would likely make. Moreover, it carries with it no assurance that it is the correct choice in terms of interpreting the provisions of the standard comprehensive liability policies of insurance.

## CONCLUSION

For the foregoing reasons Petitioner Insurance Company of North America requests that the writ be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

### Order of the Court of Appeals for the Sixth Circuit Re Petition for Rehearing

(Filed March 5, 1981)

No. 78-1322/3/4/5/6

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

INSURANCE CO. OF NORTH AMERICA
*Plaintiff-Appellant,*

v.

FORTY-EIGHT INSULATIONS, INC.,
*Defendant-Appellee Cross-Appellant,*

and

AFFILIATED FM INSURANCE CO., ILLINOIS
NATIONAL INSURANCE CO., LIBERTY
MUTUAL INSURANCE CO.,
*Defendants-Appellants,*

and

TRAVELERS INDEMNITY OF RHODE ISLAND,
*Defendant-Appellee.*

### ORDER

Before: KEITH and MERRITT, *Circuit Judges*, and PECK, *Senior Circuit Judge*

Less than a majority of the active judges of this court having voted in favor of rehearing en banc, the parties' cross-petitions for rehearing have been referred to the panel for consideration. We grant, in part, the petitions for rehearing.

## I.

All of the parties have requested that we clarify our opinion regarding its application to mesothelioma and broncheogenic carcinoma. As we indicated in footnote one of our opinion, we pretermitted a discussion of mesothelioma and broncheogenic carcinoma and focused on the disease of asbestosis. The reason for this was that the medical evidence in the record suggested that these diseases were different from asbestosis.

Mesothelioma and broncheogenic carcinoma (lung cancer) were dealt with only obliquely in the record, in the district court opinion and in the briefs on appeal. However, the parties are correct that the issue is before us on appeal and that our opinion needs clarification on this point.

We conclude that mesothelioma and lung cancer should be treated the same as asbestosis. We reach this conclusion for two reasons. First, the brief discussion in the record about these diseases supports this result. Dr. George Wright testified that recent research tends to show that the development of mesothelioma and lung cancer is linked to inhalation of asbestos and that the development of these diseases is dose-related. In other words, the greater the exposure to asbestos the greater the probability that lung cancer and mesothelioma will develop. It is true that not all persons who breathed in asbestos fibers contract lung cancer and/or mesothelioma. However, as in asbestosis, those persons who contract mesothelioma and lung cancer will have breathed in numerous asbestos fibers over the years.

Second, we rely on policy grounds. As Liberty Mutual's Petition for Rehearing reminds us, many of the underlying plaintiffs' complaints against the manufacturers allege both cancer and asbestosis. To treat cancer and asbestosis differently would needlessly complicate settlement and defense of the individual lawsuits. We see no reason to create more difficulties for the parties than already exist in this complicated case.

Accordingly, we order that the following language be inserted at the end of footnote one of our opinion:

> Nonetheless, we conclude that mesothelioma and lung cancer should be treated the same as asbestosis. We reach this conclusion for two reasons. First, the brief discussion in the record about these diseases supports this result. Dr. George Wright testified that recent research tends to show that the development of mesothelioma and lung cancer is linked to inhalation of asbestos and that the development of these diseases is dose-related. In other words, the greater the exposure to asbestos the greater the probability that lung cancer and mesothelioma will develop. It is true that not all persons who breathed in asbestos fibers contract lung cancer and/or mesothelioma. However, as in asbestosis, those persons who contract mesothelioma and lung cancer will have breathed in numerous asbestos fibers over the years.
>
> Second, we rely on policy grounds. Many of the underlying plaintiff's complaints against the manufacturers allege both cancer and asbestosis. To treat cancer and asbestosis differently would needlessly complicate settlement and defense of the individual lawsuits. We see no reason to create more difficulties for the parties than already exist in this complicated case.

## II.

Those companies advancing the manifestation theory have presented no arguments to us that we did not carefully consider beforehand. We continue to believe that both the plain meaning rule of construction and the rule requiring construction of a policy in favor of the insured support the exposure theory. The companies are correct that not all workers exposed to asbestos fibers contract an asbestos related disease. However, for the worker who does contract asbestosis, the bodily injury first occurred when the worker first started breathing asbestos fibers.

## III.

Forty-Eight, while generally content with our decision, has urged us to reconsider our decision to allocate defense costs the same as liability costs. Forty-Eight claims that we have given an unduly narrow construction to the insurance companies' duty to defend.[1]

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[1] In its Petition for Rehearing, Forty-Eight cites as an example the situation where it is initially believed that Forty-Eight's products injured a worker in a year in which Forty-Eight had insurance coverage. If it turns out that Forty-Eight's products injured a worker in a non-covered year, Forty-Eight claims that it will have to pay the full cost of defending the suit. This ignores the presumption outlined in footnote 21 or our opinion under which continued exposure to Forty-Eight's products is presumed for insurance coverage purposes. Forty-Eight will only have to pay full defense indemnity costs if there is strong evidence that exposure to Forty-Eight's products *only* took place in years when Forty-Eight had no insurance coverage.

We adhere to our original position. The exposure theory provides a fair method of allocating insurance coverage. This same method can be readily applied to allocating defense costs as well as liability costs. Where costs can be readily apportioned, as here, it is reasonable to have Forty-Eight pay its fair share of defense costs as well as indemnification costs.

Accordingly, the Petitions for Rehearing are granted in part, as outlined above, and otherwise denied. Judge Merritt adheres to the position outlined in his dissenting opinion.

ENTERED BY ORDER OF THE COURT

/s/ (Illegible)
*Clerk*

ISSUED AS MANDATE: APRIL 23, 1981
COSTS: NONE

## Opinion of the Court of Appeals for the Sixth Circuit

(Decided and filed October 21, 1980)

Nos. 78-1322, 78-1323, 78-1324, 78-1325 and 78-1326

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

INSURANCE CO. OF NORTH AMERICA,
*Plaintiff-Appellant,*

v.

FORTY-EIGHT INSULATIONS, INC.
*Defendant-Appellee- Cross-Appellant,*

and

AFFILIATED FM INSURANCE CO., ILLINOIS NAT'L INSURANCE CO., LIBERTY MUTUAL INSURANCE CO.,
*Defendants-Appellants,*

and

TRAVELERS INDEMNITY OF RHODE ISLAND,
*Defendant-Appellee.*

Appeal from the United States District Court
for the Eastern District of Michigan.

Before: KEITH and MERRITT, *Circuit Judges,* and PECK, *Senior Circuit Judge.*

KEITH, *Circuit Judge,* delivered the opinion of the Court in which PECK, *Senior Circuit Judge,* joined. MERRITT, *Circuit Judge* (pp. 33-39), filed a separate dissenting opinion.

**KEITH**, *Circuit Judge*. This case presents a novel and important question of insurance law. A manufacturer of asbestos products faces huge potential liability because of numerous lawsuits filed around the country by persons who inhaled asbestos fibers allegedly manufactured by the company. The claimed basis for liability is that the asbestos manufacturer failed to warn asbestos workers and other ultimate users of its products that asbestos was a dangerous product which, if inhaled, could cause an early death from cancer or other disease. The company had various products liability insurance policies over a twenty-year period of time. These policies were issued by five different insurance companies. Which of the insurance companies is obligated to provide a defense to the numerous lawsuits? And, assuming the manufacturer is found liable, which of the insurance companies must cover the judgment? These are the issues presented by this case. They are not easy to resolve and they have split the American insurance industry, many of whose member companies have filed amicus curiae briefs.

## FACTS

### *Background*

From 1923 until 1970, Forty-Eight Insulations, Inc. manufactured products which contained asbestos. Asbestos is a mineral compound which has high tensile strength and flexibility. Asbestos also withstands high temperatures. For these reasons, asbestos has many commercial uses, especially in the construction industry. Asbestos is used in home insulation, cements, paints and tile.

The problem is that tiny asbestos particles can become airborne when asbestos is mined and processed, when asbestos materials are used at a construction or other site, and when old buildings containing asbestos are demolished.

When these asbestos particles become airborne, a number of them are inhaled by persons in the area. The asbestos particles are deposited in the lungs. If, over the years, enough asbestos particles are inhaled, they can cause a variety of pulmonary diseases. Medical science is not certain exactly how these diseases develop, but there is universal agreement that excessive inhalation of asbestos can and does result in disease. These asbestos-caused diseases include mesothelioma, broncheogenic carcinoma (lung cancer), and asbestosis.[1]

The most common disease is asbestosis. Asbestosis occurs when fibrous lung tissue surrounds small asbestos particles in the lungs to prevent the particles from moving around or causing irritation to neighboring cells. Ordinarily, this encapsulation of the asbestos particles is a good thing. However, if too many asbestos particles are inhaled, then the encapsulation process diminishes pulmonary function and makes breathing difficult. When this occurs, the disease of asbestosis is said to be present.

Asbestosis is a progressive disease. It ordinarily takes years of breathing asbestos fibers for asbestosis to occur. And asbestosis varies greatly from person to person. Obviously, the concentration of the asbestos in the work environment is a critical factor. The more asbestos fibers a worker inhales, the more quickly a worker will contract asbestosis. Even so, there are many vagaries. The average human lung has much excess capacity and can absorb a fair amount of asbestos particles. How much varies. Many construction workers exposed to asbestos for forty years or more do not become diseased. Others, exposed to asbestos for shorter periods of time at lower concentrations, do contract asbestosis.[2]

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[1] Throughout this opinion, we shall be discussing the liability situation as it relates to asbestosis. The reason is that mesothelioma and lung cancer present very different considerations. Mesothelioma is cancer of the mesothelial cells which line the chest wall and surround the organs of the chest cavity. This cancer is associated with the inhalation of asbestos fibers. Mesothelioma generally does not occur until 20 years or more after there has been excessive inhalation of asbestos. Mesothelioma is easily discovered and diagnosed shortly after it develops. Unfortunately, there is no satisfactory treatment for the disease, and the victim almost always dies within several years of the tumor's initial development.

Lung cancer's development is similar to that of mesothelioma. However, the correlation between the inhalation of asbestos and the development of lung cancer is not established. Rather, it appears that inhalation of asbestos accelerates the development of lung cancer in persons who smoke.

The typical person who has contracted asbestosis is a worker who was employed in an industry in which many asbestos-laden products were used, e.g. construction. Usually, the worker has been exposed to asbestos particles for many years—at least ten, and generally for twenty or more.

By the late 1960s so many workers had contracted asbestosis that manufacturers began to cut back on the production of asbestos-containing products. Forty-Eight Insulations stopped using asbestos in its products in 1970. However, there remained the question of liability for the past sale of these products containing asbestos.

Suits on behalf of the injured workers were filed against the asbestos manufacturers. The workers' theory of liability was that under Restatement Torts 2d § 402(A), asbestos was an inherently dangerous product which the manufacturers had to warn them about. The workers claimed that the manufacturers had not so warned them and that therefore the workers should recover. To the extent that it was impossible to tell which particular manufacturer was responsible, they contended that all relevant asbestos manufacturers should be jointly and severally liable.[3]

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[2] Two leading articles in the medical literature on asbestosis are Selikoff, Bader, Bader, Churg, and Hammond. "Asbestosis and Neoplasis", 42 Am.J.Med. 487 (1967); Selikoff, Churg, and Hammond, "The Occurrence of Asbestosis among Insulation Workers", 132 Ann. New York Acad. Sci. 139 (1965). A good discussion of asbestosis is contained in *Borel v. Fibreboard Paper Products*, 493 F.2d 1076, 1083-85 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

The above-outlined theory of liability was endorsed in the leading case of *Borel v. Fibreboard Paper Prods.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). *See* Prosser, Law of Torts, § 52 at 315-20 (4th Ed. 1971). *Borel* has triggered an avalanche of law suits against the entire asbestos manufacturing industry. The typical complaint names a multitude of companies which manufactured asbestos-containing products over the years. One of these companies is Forty-Eight Insulations. As of the date of the district court opinion, Forty-Eight had been named as a defendant in 251 "asbestos suits". By the end of 1978, Forty-Eight had over 800 such suits filed against it. By the summer of 1979, over 1,370 cases were filed.

### *The Instant Case*

In recent years, most manufacturers have taken out insurance policies to protect them against products liability suits. Before 1955, Forty-Eight was apparently self-insured.[4] Starting in that year, Forty-Eight was covered by various insurance policies issued by different companies. The Insurance Company of North America (INA) insured Forty-Eight from October 31, 1955 to October 31, 1972 with six consecutive insurance policies whose coverage limits varied. Affiliated FM Insurance Company (Affiliated FM) insured Forty-Eight from October 31, 1972 to January 10, 1975. Illinois National Insurance Company (Illinois National) insured Forty-Eight from January 10, 1975 to January 12, 1976. Travelers Indemnity Company of Rhode Island (Travelers) insured Forty-Eight from January 12, 1976 to November 8, 1976. Liberty Mutual Insurance Company (Liberty Mutual) has insured Forty-Eight since that date.

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[3] Joint and several industry-wide liability is itself an interesting question. In asbestosis cases, plaintiff-workers in underlying lawsuits have been able to show that various asbestos manufacturers actually supplied the asbestos products to which the workers were exposed. However, in some jurisdictions, joint and several industrywide liability can be established even if a plaintiff cannot show that a particular company's or companies' products were actually involved. The mere likelihood that a company provided a defective product to the plaintiff may be sufficient to trigger liability. *See Sindell v. Abbott Labs, Inc.*, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924 (1980); *Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 289 N.W.2d 20 (1979); *Hall v. DuPont*, 345 F. Supp. 353, 370-80 (E.D. N.Y. 1972); *See also* Restatement 2d, Torts § 433 (B) (1972); Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 Fordham. L. Rev. 963 (1978).

The various policies issued by the above companies have varied in their coverage over the years.[5] However, each of the policies uniformly defined what it covered, when coverage applied and the definitions of the various terms used.[6] The reason is that the insurance industry uses standardized language in its general liability policies. Thus each of the policies taken out by Forty-Eight contained the same relevant language. This language was as follows:

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[4] Forty-Eight thought that it did have insurance coverage before 1955. However, any such policies were lost and/or destroyed and Forty-Eight was unable to prove it had any coverage before that date.

[5] See the breakdown which is reproduced as appendix "A" to this opinion.

[6] Coverage limits ranged from $300,000 (per accident)/ $100,000 (per person) from 1955 to 1962; $500,000 (per accident) from 1962 to 1973; $400,000 (per accident) from 1973 to 1975; $300,000 (per accident) in 1976; $1,000,000 (per accident) from 1976 to the present. In addition, starting in 1976, Liberty Mutual's policy contained a $100,000 per person deductible for asbestosis cases. Since most asbestosis cases have been settling for less than $100,000, this means that, as a practical matter, Forty-Eight is uninsured for asbestosis occurring after 1976. A chart containing each of the policies and their coverage is reproduced as appendix "B" to this opinion.

> [The insurer] will pay on behalf of the insured all sums which the insured shall be legally obligated to pay as damages because of . . . bodily injury or . . . property damage to which this policy applies caused by an occurrence.[7]
>
> "Bodily injury" means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom.
>
> "Occurrence" means an accident, including injurious exposure to conditions which results, during the policy period, in bodily injury. . . .

The above-cited policy language causes little difficulty in the ordinary case. Asbestosis, however, presents thorny problems since it does not clearly fit within the above language. A worker who contracts asbestosis and sues Forty-Eight and/or other asbestos manufacturers must establish liability and injury in order to win a judgment. If the worker succeeds in his suit and Forty-Eight is directed to pay, then it is clear that the above-cited insurance coverage is triggered.

But which insurance company has to pay the judgment? At first glance, it would appear that the insurance company which provides coverage when asbestosis is diagnosed should pay. However, asbestosis is a slowly progressive, insidious disease. As more and more asbestos par-

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7. In 1966, the provision providing coverage for liability "caused by an occurrence" was changed from the previous provision which provided coverage for liability "caused by accident". This case, however, centers on interpretation of the term "bodily injury". No party to this suit ascribes any significance to this 1966 change as far as this suit is concerned.

ticles settle in the lungs over years of exposure, the disease worsens. At some point, asbestosis interferes with gas exchange in the lungs and clearly manifests itself. It is thus arguable that a worker's asbestosis "occurred" during the many years that the worker was breathing in tiny asbestos particles and accumulating them in his lungs.

This case principally concerns a dispute among Forty-Eight's different insurance carriers over the years as to which carrier or carriers is liable under the above-cited policy provisions. INA filed this diversity action in the district court, seeking a declaratory judgment on this issue.

## I.

We are called upon in this case to construe uniform provisions in widely-used Comprehensive General Liability (CGL) insurance policies. We are presented with two different theories of construction.[8]

INA, Affiliated FM, Illinois National and Liberty Mutual, supported by several amici curiae, advocate the manifestation theory of liability. Under this theory, bodily injury in a case of asbestosis could not be deemed to have occurred until the asbestosis manifests itself. The date of manifestation is the date when the worker knew or should have known he has asbestosis, or the date that asbestosis is medically diagnosed, whichever came first. Accordingly, under the manifestation theory, those insurance companies on the risk when asbestosis manifests itself must pay any resultant judgment of liability. Simply put, the manifestation theory is that no "bodily injury" took place until asbestosis became apparent.

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[8] The issues presented by this case have been the subject of varying judicial interpretation and commentary. *See Porter v. American Optical,* (E.D.La. No. 75-2202, Dec. 23, 1977), on appeal to the Fifth Circuit (manifestation theory adopted); *American Motorists Ins. Co. v. E. R. Squibb*, 95 Misc.2d 222, 406 NYS2d 658 (Sup.Ct. 1978); (same); *Tenneco Chemicals v. Employers Mut. Liab. Ins. Co.* (S.D.N.Y. No. 76 Cir. 809, April 8, 1977) (exposure theory adopted); Comment, Liability Insurance for Insidious Diseases: Who Picks up the Tabs? ........ Ford. L. Rev. ........ (1980); Note, 26 Wayne L. Rev. 1127 (1980).

Forty-Eight and Travelers, supported by numerous amici curiae, advocate the exposure theory. They argue that when asbestosis manifests itself has nothing to do with when "bodily injury" took place. They emphasize that the medical testimony establishes that tissue damage starts to occur shortly after the initial inhalation of asbestos fibers and that the tissue damage worsens as the victim breathes in more and more asbestos fibers. The advocates of the exposure theory characterize asbestosis as a series of continuing injuries to the body which accumulate to cause death or disability. Under this theory, asbestosis is a "continuing tort" and all insurance companies which provided coverage from the time of the worker's initial exposure to time of the manifestation of the disease are jointly and severally liable to defend and to indemnify Forty-Eight if liability is found.

The district court adopted the exposure theory.[9] The court first noted that many of the insurance companies that now advocate the manifestation theory had initially embraced the exposure theory. The court found this initial conduct instructive as to the proper meaning of the policy provisions.

The principal basis for the district court's position, however, was the medical evidence. The medical testimony established that "each tiny deposit of scar-like tissue causes injury to a lung". From this, the court reasoned that "each such insult-causing injury is an 'occurrence' for the purpose of determining which coverage applies." 451 F.Supp. 1230, 1239 (E.D. Mich. 1978).

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[9] More accurately put, the court adopted a version of the exposure theory. In its cross-appeal, Forty-Eight advocates a series of changes to the district court's exposure theory. These issues are discussed below in part III.

Finally, the district court thought that the exposure theory best served the expectations of the contracting parties. The court emphasized that an injured worker who sues Forty-Eight makes out a prima-facie case by showing injury and exposure to Forty-Eight's products. The plaintiff in such an underlying lawsuit can recover even if he cannot pinpoint the exact time when each injury occurred. Under *Borel, supra,* all asbestos manufacturers to whose products a worker was exposed are jointly and severally liable for the resultant, cumulative injury. By analogy, the district court reasoned that the manufacturers' insurance coverage should parallel their liability, and that each insurance company should be jointly and severally liable to defend and indemnity the manufacturer. Otherwise, concluded the district court, the manufacturer's insurance coverage would be illusory.

All parties have appealed.

## II.

In each case where a plaintiff sues an asbestos manufacturer, a hearing could be held to determine at what point the buildup of asbestos in the plaintiff's lungs resulted in the body's defenses being overwhelmed. At that point, asbestosis could truly be said to "occur". From then on, all companies which insured the manufacturer would be treated as being "on the risk".[10]

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[10] Judge Merritt's ingenious opinion tries to find this optimal point by looking to X-ray diagnosis and establishing a 10-year point. The problem with this innovative theory is that it disregards the medical testimony that "bodily injury" takes place

(Continued on following page)

The only problem with this Solomonian interpretation is that no one wants it. The principle reason is cost. If medical testimony as to asbestosis' origin would have to be taken in each of the thousands of asbestosis cases, the cost of litigation would be prohibitive. This appears to be especially true since many of the asbestosis cases are settled before trial. In addition, it is almost impossible for a doctor to look back and testify with any precision as to when the development of asbestosis "crossed the line" and became a disease.

The only thing on which all parties agree is that there is a need for us to arrive at an administratively manageable interpretation of the insurance policies—one than can be applied with minimal need for litigation. Reaching such a beneficial result is certainly desirable, but it greatly complicates our task. In the real world, there are few Solomonian possibilities. And, as we have just seen, those that do exist are often impractical. Thus, we must turn to the arguments advanced on appeal.

### A.

As noted above, the medical testimony is not in dispute. Asbestosis is a slowly progressive disease. Injury, in the sense that there is tissue damage, occurs shortly after the initial inhalation of asbestos fibers. It was because of this

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**Footnote continued—**

at or shortly after inhalation. Moreover, this theory places too much weight on the state of the art in medical diagnosis. As Judge Merritt acknowledges, X-ray diagnosis is simply one tool used to find whether a worker has asbestosis. The medical experts termed it a "crude" tool. In contrast, a lung biopsy would reveal damage shortly after initial exposure. Of course, this is not currently feasible. But what if medical advances make biopsy or a similar procedure feasible? We prefer to say that bodily injury is bodily injury from the beginning, rather than to say that bodily injury is bodily injury ten years from initial exposure because that's when an x-ray shows it.

early tissue damage that the district court concluded that the insurance companies would be liable from the date of a worker's initial exposure to asbestos. The district court thus equated the "bodily injury" which is covered by the insurance policies with the development of the tiny, scar-like tissue of the victim's lungs. Because each additional inhalation of asbestos fibers results in the build-up of additional scar tissue in the lungs, the district court deemed the "bodily injury" to occur whenever asbestos fibers were inhaled.

The medical testimony strongly supports the exposure theory. The appellants—who are proponents of the manifestation theory—seek to blunt the significance of this testimony. They agree that tissue damage takes place shortly after initial inhalation of asbestos fibers. However, they contend that this is irrelevant. Appellants argue that what should matter under the contract is *compensable* "bodily injury". They rely heavily on analogous insurance law cases. These cases will be discussed below.

We concede that appellants have a good argument. How one views "bodily injury" or "disease" depends on how one defines those terms. The doctors who testified openly stated that this was so. Dr. George Wright, for example, testified as follows:

> Well, you get, first of all, you get into something of a matter of semantics. What is a disease? . . . At what stage of quantitative abnormality does something become a disease? It's a judgment call.

Dr. Wright explained that a physician or biologist might not regard asbestosis as a disease so long as it was not diagnosable by x-ray or if the patient had no symptoms. In contrast, a histologist, who studies tissue systems, would regard asbestosis as a disease from the very beginning. Dr. Wright explained:

> Now, is tissue injury a disease? You go to the histologist and he will say, "You bet your boots it is a disease". He will find asbestos fibers, asbestos bodies, and he will say that is asbestos[is], period. That is a disease. And he can do that long before the clinician can do it.

This "judgment call" is what is before us for review. As a matter of contract law, in this case, when did the disease of asbestosis occur?

Appellants urge that date of manifestation is the preferable interpretation of when bodily injury occurs. Appellants claim that this interpretation best serves the intent of the parties, which is to treat cumulative disease cases the same as ordinary accident cases. Otherwise, argue appellants, the limits and deductibles contained in the various insurance policies make no sense.[11] Appellants emphasize that manifestation is the only theory that reasonably allows the operation of the insurance industry's claims machinery and administration of suits and coverage. In a nutshell, the proponents of the manifestation theory urge that we treat asbestosis the same as any other disease and that we not make any "special rules" for the cumulative disease situation which asbestosis presents.

We cannot agree. Cumulative disease cases *are* different from the ordinary accident or disease situation. First, the underlying theory of tort liability is that the asbestos manufacturers continually failed to warn the asbestos workers and that, as a result of this, continuous breathing of asbestos particles allowed asbestosis to progress to the point where it caused death or injury. The insurance policies before us are comprehensive general liability policies which are designed to insure the manufacturer against products liability suits. The contracting parties would expect coverage to parallel the theory of liability. Otherwise, as the district court noted, the manufacturer's coverage becomes illusory since the manufacturer will likely be unable to secure any insurance coverage in later years when the disease manifests itself.[12]

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[11] See fn. 28, *infra*.

Second, a question might exist as to whether the microscopic tissue injury which occurs upon initial inhalation of asbestos should be defined as the occurrence of a "disease" or "bodily injury". However, there is universal medical agreement that the time when asbestosis manifests itself is not the time when the disease occurred. No doctor would say that asbestosis occurred when it was discovered. As Dr. Wright testified:

> Suppose a man never goes to see anybody or never has a chest [x-ray] film made or anything else done until he is far advanced and the diagnosis is then made on that date. Well, nobody, I think, would ask you to believe that is when the disease began. That is when the diagnosis was made, but it was a temporal phenomenon based on things having nothing to do with tissue injury; namely, when did the man go to see a doctor so the diagnosis could be made?

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12. In its brief, INA states that the district court's reliance upon the *Borel* case "as controlling precedent for the interpretation of insurance contracts is almost embarrassing. Contractual language controls contractual interpretation. Rules of Tort do not." INA oversimplifies the issue in its effort to discredit the district court. The insurance policies which we must interpret are meant to protect a manufacturer from products liability judgments. The legal theory used in the underlying tort suits is certainly relevant in helping a court define what was meant by the policy language.

Third, although there are solid arguments to support the manifestation theory, we are bound to broadly construe the insurance policies to promote coverage. This is a diversity case and we must apply Illinois and New Jersey law. We adopt the district court's cogent discussion of this issue:

> In a contract diversity action such as this, Michigan conflict of law rules require the application of the law of the place where the insurance policies were issued and countersigned. *Chrysler Corp. v. Insurance Company of North America*, 328 F. Supp. 445 (E.D. Mich. 1971). The parties agree that Illinois law applies to the interpretation of all the policies except the Liberty Mutual policies, which are governed by New Jersey law. The law of both states holds that where the terms of an insurance contract are clear and unambiguous, they must be given their common and ordinary meaning. See *Canadian Radium & Uranium Corp. v. Indemnity Insurance Company of North America*, 411 Ill. 325, 104 N.E.2d 250 (1952); *Boswell v. Travelers Indemnity Co.*, 38 N.J. Super. 599, 120 A.2d 250 (1956); *Wilkinson & Son, Inc. v. Providence Washington Ins. Co.*, 124 N.J. Super. 466, 307 A.2d 639 (1973). In both states insurance contracts are to be liberally construed in favor of the insured and against the insurer. *J. L. Simmons Co. v. Fidelity and Casualty Co.*, 511 F.2d 87 (6th Cir. 1975) (applying Ill. law); *Last v. West American Co.*, 139 N.J. Super. 456, 354 A.2d 364 (N.J. 1976). If there are ambiguities in the policy, or uncertainty over its interpretation, the policy is to be construed against the insurer, and in favor of the insured. *Tiffany Decorating Co. v. General Accounts Fire and Life*, 12 Ill.App.3d 597, 299 N.E.2d 378 (1973); *Bryan Construction Co. v. Employer's Surplus Lines Ins. Co.*, 60

> N.J. 375, 290 A.2d 138 (N.J. 1972). See also *Corbett Co. v. Ins. Co. of North America*, 43 Ill.App.3d 624, 2 Ill. Dec. 148, 357 N.E.2d 125 (1976).

451 F.Supp. at 1237-38.

### B.

Because of policy considerations and because of the medical testimony, we do not find controlling the analogous insurance cases urged upon us by the appellants.

First, there are the statute of limitations cases. In the past, defendants have argued that since a disease "occurs" at or shortly after exposure to a foreign substance, that is the time when the statute of limitations should start running. The problem is that such a ruling would bar relief to many plaintiffs who were unaware that they were being injured until years later when the disease manifests itself. To avoid such an unfair result, most courts[13] have adopted a manifestation rule:

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[13] *See United States v. Kubrick*, 444 U.S. 111, 123-24 (1979); *Urie v. Thompson*, 337 U.S. 163, 170-71 (1949); *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 570, 574-5 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *Roman v. A. H. Robins Co.*, 518 F.2d 970, 972 (5th Cir. 1975); *Schenebeck v. Sterling Drug Inc.*, 423 F.2d 919, 924 (8th Cir. 1970); *R. J. Reynolds Tobacco Co. v. Hudson*, 314 F.2d 776, 780 (5th Cir. 1963); *Brush Berylium Co. v. Meckley*, 284 F.2d 797, 800 (6th Cir. 1960); *Sylvania Elec. Prods., Inc. v. Barker*, 228 F.2d 847-8, (1st Cir. 1955), *cert. denied*, 350 U.S. 988 (1956); *Thrift v. Tenneco Chems., Inc.*, 381 F. Supp. 543, 546 (N.D. Tex. 1974); *Withers v. Sterling Drug, Inc.*, 319 F. Supp. 878, 881 (S.D. Ind. 1970); *Steiner v. Ciba-Geigy Corp.*, 364 So. 2d 47, 48-49 (Fla. Dist. Ct. App. 1978); *Chrischilles v. Griswold*, 260 Iowa 453, 463, 150 N.W. 2d 94, 199 (1967); *Raymond v. Eli Lilly & Co.*, 117 N.H. 164, 175-76, 371 A.2d 170, 177 (1977); *Frohs v. Greene*, 253 Or. 1, 2-4, 452 P. 2d 564, 565 (1969); *Gilbert v. Jones*, 523 S.W.2d 211, 213 (Tenn. Ct. App. 1974).

Indeed, asbestosis cases themselves are a prime example of the application of the "discovery rule" applied in statute of limitations cases. *See Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d 155, 160-61 (8th Cir. 1975); *Borel, supra*, 493 F.2d at 1102; *Velasquez v. Fibreboard Paper Prods. Corp.*, 97 Cal. App. 3d, 881,

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> "inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently, the afflicted employee can be held to be "injured" only when the accumulated efforts of the deleterious substance manifest themselves". *Urie v. Thompson,* 337 U.S. 163, 170 (1949) (citation omitted)

Here, we find that the policy considerations are the opposite of those present in the statute of limitations cases. A manifestation rule would deny coverage to the insured manufacturer. Moreover, it is the injury and not its discovery that makes the manufacturer liable in the underlying tort suit. As noted above, such underlying liability should also trigger insurance coverage. We disagree with appellant's argument that identical language used in statutes of limitations and insurance policies must necessarily be interpreted identically. Linguistic uniformity should not dictate how contracts or statutes are interpreted. Statutes of limitation are meant to protect defendants against stale claims, not bar injured plaintiffs who have acted in good faith. Insurance contracts are meant to cover the insured.[14]

Second, there are the worker's compensation cases. Assume that a worker is debilitated by a progressive disease

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Footnote continued—

889, 159 Cal. Rptr. 113, 118 (1979); *Louisville Trust Co. v. Johns-Manville Prods. Corp.*, 580 S.W.2d 497 (1979); *Harig v. Johns-Manville Prods. Corp.*, 284 Md. 70, 71, 394 A. 2d 299, 30C (1978).

We note, however, that a minority of cases have rejected this liberal view and strictly hold that the statute of limitations begins to run from the time of injury, even if undiscovered. *See Thornton v. Roosevelt Hospital,* 47 N.Y.2d 780, 417 N.Y.S. 920, 391 N.E. 2d 1002 (1979).

[14] *See e.g. Tijsseling v. General Accident Fire & Life Assurance Corp.,* 55 Cal. App. 3d 623, 127 Cal. Rptr. 681 (1976) (that the cause of action accrued at manifestation did not mean that damages for insurance coverage purposes had to be measured from that point as well).

like abestosis. Where that worker has been exposed to asbestos while working for various employers over the years, which employer is liable for the worker's compensation coverage? Courts have generally adopted a "last employer pays" rule.[15] This rule, however, is the general rule applicable in worker's compensation cases.[16] The underlying rationale for the rule is "the overriding importance of efficient administration in this area." *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, 145 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). While such considerations are present here, they do not override the rules of contract interpretation we have already noted. Moreover, because all that is required to establish workers compensation liability is a work-related injury, administrative considerations are of greater significance in workers compensation cases than in liability insurance cases.

Third, and of most relevance, are health insurance cases. Under these cases, there is no coverage until a disease is diagnosable as such.[17] Thus, in *Metropolitan Life Ins.*

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[15] *See e.g. General Dynamics Corp. v. Benefits Review Bd.*, 565 F.2d 208 (2d Cir. 1977); *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, *cert. denied*, 350 U.S. 913 (1955); *Grain Handling Co. v. Sweeney*, 102 F.2d 464 (2d Cir.), *cert. denied*, 308 U.S. 570 (1939); *Sylvia's Case*, 313 Mass. 313, 47 N.E. 2d 293 (1943); *Yuraw v. Jersey Hat Corp.*, 131 N.J.L. 265, 36 A. 2d 296 (1944), *aff'd* 132 N.J.L. 180, 39 A.2d 371 (1944).

[16] We note that Illinois has passed specific worker's compensation legislation to deal with asbestosis and silicosis cases. Under this legislation, the last employer where the worker was exposed to asbestosis is liable. Ch. 48 Ill. Rev. Stat., § 172. 36(d) (1975). New Jersey Law is similar. *See Bucuk v. Zusi Brass Foundry*, 49 N.J. Super. 187, 139 A. 2d 436 (1958).

[17] *See e.g. Royal Family Ins. Co. v. Grimes*, 42 Ala. App. 481, 168 So. 2d 262 (1964); *Metropolitan Life Ins. Co. v. Reynolds*, 48 Ariz. 205, 60 P.2d 1070 (1936); *Broccolo v. Horace Mann Mut. Cas. Co.*, 37 Ill. App. 2d 493, 186 N.E. 2d 89 (1962); *Cohen v. North American Life & Casualty Co.*, 150 Minn. 507, 185 N.W. 939 (1921); *Kissil v. Beneficial Nat. Life Ins. Co.*, 64 N.J. 555, 319 A.2d 67 (1974); *Reiser v. Metropolitan Life Ins. Co.*, 262 App. Div. 171, 28 N.Y.S. 2d 283 (1st Dept. 1941), *aff'd* 289 N.Y. 561, 43 N.E.2d 534 (1942). *See generally Annot.*, 53 A.L.R. 2d 686 (1957).

*Co. v. Reynolds,* 48 Ariz. 205, 60 P.2d 1070 (1936), a court found coverage for insanity which manifested itself during the policy period even though it was caused by syphilis contracted before there was insurance coverage. Similarly, *Cohen v. North American Life & Casualty Co.,* 150 Minn. 507, 185 N.W. 939 (1921), also found coverage where the insured underwent surgery for a condition which had a cause which predated the policy period.

These cases certainly appear to provide support for the manifestation theory. We do not, however, view them as controlling here. On the contrary, we think that they support the exposure theory. The reason is that the health insurance cases rely on the same rules of construction that we think are applicable here: insurance policies must be strictly construed in favor of the injured and to promote coverage; similarly, a policy must be construed to favor the legitimate expectations of the parties.

In *Metropolitan Life Ins. Co., supra,* the court construed an insurance policy which provided coverage where the insured had become totally and permanently disabled, as the result of "bodily injury or disease occurring and originating after the issuance of said Policy . . ." In *Cohen,* the court construed a similar insurance policy which provided coverage for a disability resulting from "a disease which shall originate and begin after this policy shall have been in continuous force for 30 days."

Both cases reached the same result for the same reasons. Health insurance policies protect the insured in case of disabling sickness. This is why people buy such policies in the first place. It would be unfair to the insured—and contrary to his expectations when he bought the insurance—to allow a hidden condition to defeat the coverage which he bought.[18]

In this case, we are faced with two possible constructions, one of which is likely to leave the manufacturer insured, the other of which leaves the manufacturer uninsured for all practical purposes. We think that Illinois and New Jersey courts would try to construe the contract language to embrace the exposure theory.

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18. There is yet another line of cases relating to property insurance. Under these cases, latent defects in property which later cause damage do not trigger insurance coverage. *See Maples v. Aetna Casualty & Surety Co.*, 83 Cal. App. 3d 641, 148 Cal. Rptr. 80 (1978); *Tijsseling v. Gen'l Accident Fire & Life Assur. Corp.*, 55 Cal. App. 3d 623, 127 Cal. Rptr. 681 (1976); *Remmer v. Glens Falls Indemnity Co.*, 140 Cal. App. 2d 84, 295 P.2d 19 (1956); *Oceanonics Inc. v. Petroleum Distrib. Co.*, 280 So. 2d 874 (La. Ct. App. 1973), *aff'd*, 292 So. 2d 190 (La. 1974); *Deodato v. Hartford Ins. Co.*, 143 N.J. Super. 396, 363 A.2d 361 (1976), *aff'd*, 154 N.J. Super. 263, 381 A.2d 354 (1977); Annot. 57 A.L.R. 2d 1385 (1958); *contra Sylla v. United States Fidelity & Guaranty Co.*, 54 Cal. App. 3d 895, 127 Cal. Rptr. 38 (1976). In these cases, insurance coverage did not begin until the defect showed itself. However, in each of these cases, no damage or injury *of any kind* took place until manifestation.

However, when courts are dealing with property damage situations where damages slowly accumulate, courts have generally applied the exposure theory. So long as there is tangible damage, even if minute, courts have allowed coverage from that time. *Champion Int'l Corp. v. Continental Casualty Co.*, 546 F.2d 502 (2d Cir. 1976), *cert. denied*, 434 U.S. 819 (1971); *Union Carbide Corp. v. Travelers Indemnity Co.*, 399 F. Supp. 12 (W.D. Pa. 1975); *Gruol Constr. Co. v. Ins. Co. of N. America*, 11 Wash. App. 632, 524 P.2d 427 (1974). *But see United States Fidelity & Guar. Co. v. American Ins. Co.*, 169 Ind. App., 345 N.E. 2d 267.

It is true that the above cases stand for the general rule that general liability insurance policies protect against injury and not just against the occurrence of a negligent act where that act does not result in injury. However, as the district court noted below, "[t]he negligent acts alleged in the underlying lawsuits occurred when the products were sold without sufficient warning, not when the plaintiffs were exposed. The medical evidence in this case indicates clearly that injury to lung tissue occurs soon after exposure, not when the disease manifests itself." 451 F. Supp. at 1241.

## C.

We do not rely on judicial fiat. Initially, we note that Forty-Eight strenuously argues that the policy language is ambiguous. It points out that the insurance industry is divided between the manifestation and exposure theories and that some insurance companies which initially accepted coverage under the exposure theory only belatedly changed their position. It further emphasizes that words such as "bodily injury" and "occurs" are inherently ambiguous.

We think that a better view is that the contractual terms in issue here, "bodily injury" and "occurrence" are inherently ambiguous as applied to the progressive disease context before us. A cumulative, progressive disease does not fit the disease or accident situation which the policies typically cover. There is usually little dispute as to when an injury occurs when dealing with a common disease or accident. As can be seen, in this case there is considerable dispute as to when an injury from asbestosis should be deemed to occur. For this reason, we can apply the above-stated canons of construction and resolve doubts in favor of maximizing coverage.

Aside from this, however, we believe that the policy language itself is best construed along the lines of the exposure theory. We need only look at the definition of "bodily injury" in the policy. Bodily injury is defined as "bodily injury, sickness or disease . . ." It is tautological that bodily injury can be "bodily injury" and is not necessarily just a "disease". The medical evidence is uncontroverted that "bodily injury" in the form of tissue damage takes place at or shortly after the initial inhalation of asbestos fibers. Thus, it requires only a straightforward interpretation of the policy language for us to adopt the exposure theory. Indeed, for insurance purposes, courts have long defined the term "bodily injury" to mean "any localized, abnormal condition of the living body." *See* Appleman, Insurance Law and Practices § 355 (1965).

We do not find persuasive appellants' contention that "bodily injury" means "compensable bodily injury." The manufacturer here paid for protection from bodily injury resulting in liability. It should make no difference *when* the bodily injury happens to become compensable. Put another way, we see nothing in the policy which requires that the underlying plaintiffs' cause of action accrue within the policy period. There exists a clear distinction between when bodily injury occurs and when the bodily injury which has occurred becomes compensable.

Although the problem presented by this case is one of first impression for an appellate court, the parties were aware of the potential problems which cumulative tort cases might present throughout the contract period. The etiology of asbestosis has been known since at least the 1930's. Although *Borel* was not decided until 1973, it was certainly foreseeable that asbestos manufacturers might be held liable for failing to warn workers of the danger of asbestos. "But though the application is novel, the underlying principle is ancient. Under the law of torts, a person has long been liable for the foreseeable harm caused by his own negligence. This principle applies to the manufacture of products as it does to almost every other area of human endeavor." *Borel, supra* at 1103.

The policies themselves show that the insurance industry contemplated the problem presented by cumulative trauma cases.[19] Since 1962, each of the policies in ques-

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[19] We additionally note that published interpretations of the standard clauses in the industry-wide comprehensive general liability policy recognized the possibility that a court would adopt

(Continued on following page)

tion has included in its definition of "occurrence" a provision referring to continuous or repeated exposure to conditions which result in injury.[20] There is strong evidence that coverage of diseases such as asbestosis was contemplated. Indeed, appellants openly admit that this is true. There is no similar provision in the policies restricting coverage to when asbestosis manifests itself. The insurance industry doubtless did not forsee the extent of the liability problem asbestosis cases would present. However, that in itself is no basis for construing the contract the way the appellants want.

In sum, we think that the exposure theory adopted by Chief District Judge John Feikens is the superior interpretation of the contract provisions.[21] "Bodily injury" should be construed to include the tissue damage which

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Footnote continued—

a proration scheme. *See* R. Elliott, The New Comprehensive General Liability Policy 12-3 to 12-5 in Practicing Law Institute, Liability Insurance Disputes (Sol Schreiber, ed. 1968) ("In some exposure types of cases involving cumulative injuries it is possible that more than one policy will afford coverage. Under these circumstances, each policy will afford coverage to the bodily injury or property damage occurring during its policy period."); W. Abrist, The New Comprehensive General Liability Insurance Policy: A Coverage Analysis (Defense Res. Inst., Inc. 1966) ("in some exposure types of cases involving cumulative injuries it is possible that more than one policy will afford coverage each to apply to bodily injury or property damage occurring during its policy period.")

This shows that there was at least a recognized possibility that a court would adopt some form of proration scheme.

[20] *See* appendix A.

[21] Appellants' argument *in terrorem* is that a ruling in favor of the exposure theory will create vast liability for a host of latent diseases. The appellants point out that the insurance policies in question expired years ago. We here rule only concerning asbestosis, a disease which has been long-known. If a disease is unknown, we see no underlying basis for liability. The problems of liability under old insurance policies are no different here than in cases where a minor was injured and we did not sue while he was under a disability.

takes place upon initial inhalation of asbestos. That is both a literal construction of the policy language and the construction which maximizes coverage. It is also the construction which, we think, best represents what the contracting parties intended.

The thrust of the appellants' arguments is that we should apply a uniform manifestation rule in all cases, including this one, and not be concerned with medical intricacies. We see no evidence that this is what the parties meant.

## III.

Although victorious below, Forty-Eight urges that we modify the district court opinion in three respects. We shall discuss these questions *seriatim*.

### A.

The district court, as discussed above, adopted the exposure theory for purposes of liability and prorated liability among all of the insurance companies which were on the risk while the injured victim was breathing in asbestos. For those years that Forty-Eight did not have insurance, the district court treated the manufacturer as self-insured and responsible for a pro-rata share of the cost of indemnification. Thus, if insurer A provided 3 years of coverage, insurer B an additional 3 years, and the manufacturer was uninsured for the remaining 3 years, liability would be allocated at 1/3 for each of the three concerns.

The district court applied an identical rule apportioning the costs of defending the underlying suits. To the extent that the manufacturer was uninsured, it has to bear its pro-rata share of the costs of defense.

Forty-Eight agrees that it must bear its share of the liability risk for those years in which it had no insurance —that is, before October of 1955. However, Forty-Eight vehemently argues that the district court was wrong in prorating the cost of defending the lawsuits against it.

Forty-Eight argues that the insurer's obligation to defend is very broad—broader than its obligation to indemnify. Under the very wording of the insurance policies, the insurance companies had a duty to defend based on the allegations in the complaint, even if the allegations are groundless, false, or fraudulent . . ." *See Maryland Casualty Co. v. Peppers,* 64 Ill. 2d 187, 355 N.E. 2d 24 (1976).

Forty-Eight argues further that the duty to defend is sufficiently broad so that it arises when one count of the complaint is within policy coverage and other counts are not. In many such cases, courts have not permitted apportionment of defense costs between the insurer and the insured.[22] From these cases, Forty-Eight argues that so long as any insurance company had a duty to defend, it (Forty-Eight) should not be liable for any costs of defense, even if part or most of the underlying lawsuit concerned periods of time when Forty-Eight was uninsured.

We cannot agree. We fully accept the legal principles and cases on which Forty-Eight relies. What Forty-Eight ignores is the *rationale* on which its authorities are based. An insurer must bear the entire cost of defense when "there is no reasonable means of prorating the costs of defense between the covered and the not-covered items." *Nat'l. Steel Construction Co. v. Nat'l. Union Fire Ins. Co.,* 14 Wash. App. 573, 543 P.2d 642, 644 (1975). Thus, in the typical situation, suit will be brought as the result of a single accident, but only some of the damages sought will be covered under the insurance policy. In such cases, apportioning defense costs between the insured claim and the uninsured claim is very difficult. As a result, courts impose the full cost of defense on the insurer.[23]

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[22] *Tampa Elec. Co. v. Stone & Webster Corp.,* 376 F. Supp. 27 (M.D. Fla. 1973); *Hogan v. Midland Nat'l. Ins. Co.,* 3 Cal. 3d 553, 91 Cal. Rptr. 153, 476 P.2d 285 (1970); *St. Paul Fire & Marine Ins. Co. v. Hodor,* 200 So.2d 205 (Fla. Ct. App. 1967); *Prince v. Universal Underwriters Ins. Co.,* 143 N.W. 2d 708 (N.D. 1966); *Mannheimer Bros. v. Kansas Cas. & Sur. Co.,* 149 Minn. 482, 184 N.W. 189 (1921); *Home Ins. Co. v. Pinski Bros. Inc.,* 160 Mont. 219, 500 P.2d 945 (1972).

These considerations do not apply where defense costs can be readily apportioned. The duty to defend arises solely under contract. An insurer contracts to pay the entire cost of defending a claim which has arisen within the policy period. The insurer has not contracted to pay defense costs for occurrences which took place outside the policy period. Where the distinction can be readily made, the insured must pay its fair share for the defense of the non-covered risk.[24]

In this case Forty-Eight's own exposure theory, substantially adopted by the district court, establishes that a reasonable means of proration is available. Forty-Eight has urged that indemnity costs can be allocated by the number of years that a worker inhaled asbestos fibers. By embracing the exposure theory, we have agreed. There is no reason why this same theory should not apply to defense costs. The different insurance companies will pro-rate defense costs among themselves. It is reasonable to treat Forty-Eight as an insurer for those periods of time that it had no insurance coverage.[25] Were we to adopt Forty-Eight's position on defense costs a manufacturer which had insurance coverage for only one year out of 20 would be entitled to a complete defense of all asbestos actions the same as a manufacturer which had coverage for 20 years out of 20. Neither logic nor precedent support such a result.

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[23] *See e.g. All Star Ins. Corp. v. Steel Bar, Inc.*, 324 F. Supp. 160, 163 (N.D. Ind. 1971); *Apex Mutual Ins. Co. v. Christner*, 99 Ill. App. 2d 153, 240 N.E. 2d 742 (1968); *Marston v. Merchants Mutual Ins. Co.*, 319 A.2d 111, 114 (Me. 1974); *Satterwhite v. Stolz*, 79 N.M. 320, 442 P.2d 810, 812 (1968); *Steel Erection Co. v. Travelers Indemnity Co.*, 392 S.W. 2d 713, 715-6 (Tex. Civ. App. 1965); *Waite v. Aetna Casualty & Surety Co.*, 77 Wash. 2d 850, 467 P.2d 847, 852-3 (1970).

[24] *See* cases cited at n22.

## B.

Forty-Eight also argues that liability for asbestos-caused injuries should not be permitted for any time period unless it can be shown that its products were involved. Although the district court used the term "joint and several liability", we read its decision as implicitly adopting this position.

In an underlying asbestosis suit, the plaintiff must show that Forty-Eight's products injured him in order to be able to maintain a cause of action against Forty-Eight.[26] Under *Borel*, Forty-Eight would be jointly and severally liable along with the other asbestos manufacturers. 493 F.2d at 1094-96. However, in allocating the cost of indemnification under the exposure theory, only contract law is involved. Each insurer is liable for its pro rata share.

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[25] Forty-Eight raises the spectre of a conflict of interest between the insurers and Forty-Eight, since the insurance company would have an interest in minimizing the amount of exposure during its policy period and maximizing that of the manufacturer for those periods that the latter was self-insured. We cannot agree that this is a significant problem in light of an attorney's duty to protect the interest of the insured. *See e.g. Parsons v. Continental Nat'l Am. Group*, 113 Ariz. 223, 550 P.2d 94 (1976).

[26] As we note in n. 3, *supra*, in some cases, courts have adopted a theory of industry-wide enterprise liability even absent proof that a given company's product or products caused injury. So far as we know, however, this broad theory has not been extended to asbestosis cases.

The insurer's liability is not "joint and several", it is individual and proportionate. Accordingly, where an insurer can show that no exposure to asbestos manufactured by its insured took place during certain years, then that insurer cannot be liable for those years. The reason is simple: no bodily injury *resulting from Forty-Eight's products*, took place during the years in question. The same thing would be true if an insurer could show that a worker used an effective respirator during certain years. Again, no "bodily injury" would have taken place.

We think that this is implicit in the district court's opinion and only state it here for clarity. However, the burden of disclaiming coverage will be on the insurer for the year or years in question.[27]

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[27] We recognize that the general rule is that the burden of proof to show coverage is on the insured. *See e.g. Hayes v. Country Mutual Ins. Co.*, 28 Ill. 2d 60, 192 N.E.2d 855, 858 (1963); *Warren v. Employers' Fire Ins. Co.*, 100 N.J. Super, 464, 242 A.2d 635, 639 (1968), *rev'd on other grounds*, 53 N.J. 303, 250 A.2d 578 (1969); 46 C.J.S. Insurance § 1316; 44 Am. Jur. 2d Insurance § 1964.

In an asbestosis case, however, under *Borel*, all that an injured worker need do is prove that a given manufacturer's products contributed to the worker's asbestosis at any time. That is enough to trigger joint and several liability. As the briefs filed in this case forcefully remind us, few companies keep records more than 15 or 20 years, if that long. Thus, in many if not most cases, it will be impossible to tell which company's products were used at what time. At best, there will be vague testimony that manufacturer X's products were used at a certain job site during certain years. Considering that much exposure took place during the 1930's and 1940's, vague testimony is the best evidence that can be unearthed in many cases.

Because of these unique circumstances, we think it appropriate to presumptively view each manufacturer as being on the risk for each of the years in which a worker was exposed to asbestosis. If an insurance company can show that a certain manufacturer's products were not or could not have been involved for certain years, it will be absolved from paying its pro-rata share for those years. Given the impossibility in most cases of ascertaining which company provided asbestos products in different years, we think that this is the fairest way to apportion liability. Thus, we simply reverse the ordinary burden of proof and place it on the insurer. We are keenly aware of the need to apply a straightforward formula and not one which will lead to additional litigation.

## C.

Finally, Forty-Eight urges that we modify the district court's proration formula. Forty-Eight argues that the formula should reflect not only the injury caused by asbestos during the policy years when the worker breathed in asbestos fibers, but also the injury which developed afterward. Thus, if three insurance companies were on the risk for a 9 year period of exposure, under Forty-Eight's formula the first insurer would be on the risk for the first 3 years *plus* the remaining 6 while the disease progressed. The second insurer would be on the risk for 3 years *plus* the following 3 years. The final insurer would be on the risk only for the final 3 years. Thus, liability would be apportioned 9/18 for the first insurer, 6/18 for the second, and 3/18 for the third. Under the district court's formula, of course, each insurer would be liable for 1/3 of the costs.

We cannot accept this interesting formula because of the explicit language of the policies which define "occurrence" as "an accident, *including continuous or repeated exposure to conditions*". (emphasis added) Moreover, this proposed formula would place different obligations upon insurers who are in the same position. The extent of the insurer's liability would turn on the accident of *when* an insurer provided coverage. We reject this anomalous result.

### *Conclusion*

Because the insurance industry did not fully appreciate the extent of potential liability for asbestos-caused injuries, we have this impossible problem before us. There is no truly satisfactory solution we can make. Each theory has its flaws and anomalies.[28] Judge Feikens struggled with this case, as we have, and thought that the exposure theory was preferable. Although his opinion has been challenged by virtually every party and amicus on one ground or another, we think that he reached the right result for the right reasons.[29]

The judgment of the district court is affirmed.

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[28] Appellants are correct that the exposure theory we adopt has problems with "stacking". From 1955 through 1977, Forty-Eight held twelve different insurance policies issued by five different companies. Eleven of these policies had aggregate limits of from $300,000 to $500,000 per occurrence. The twelfth policy had an aggregate limit of $1,000,000. The combined aggregate limits of the twelve policies is $5.6 million.

The problem is that if the inhalation of each asbestos fiber is deemed to be a separate "bodily injury", this results in the "stacking" of liability coverage to produce coverage that is many times $5.6 million. This amounts to giving Forty-Eight much more insurance than it paid for. The district court recognized the problem which stacking presented. The court stated:

> In any event, no insurer should be held liable in any one case to indemnify Forty-Eight for judgment liability for more than the highest single yearly limit in a policy that existed during the period of the claimant's exposure for which judgment was obtained. 451 F.Supp. at 1243.

We agree with the district court. The initial exposure to asbestos fibers in any given year triggers coverage. However, under the terms of the policies, additional exposure to asbestos fibers is treated as arising out of the same occurrence. Thus, on its face, the liability of each insurer is limited to maximum amount "per occurrence" provided by each policy. We have no problem with the district court's extending the policy language so that each insurer would face no more liability per claim than the maximum limit it wrote during any applicable year of coverage.

[29] Appellant Liberty Mutual warns us in its brief that the district court's opinion, "if not corrected, will plague the nation's trial courts and appellate courts, together with insurers and insureds alike, for many years to come." We think that the "plague" will come regardless of how we decide this case. The cause of the plague, however, is an insurance industry which adopted a standard policy which is inadequate to deal with the problems of asbestosis.

## APPENDIX A

| Policy Name and Number | From | To | One Person One Accident | One Person More Than One Accident | Aggregate |
|---|---|---|---|---|---|
| Ins. Co. of North America | | | | | |
| 9LB21567 | 10/31/55 | 10/31/58 | 100,000 | 300,000 | 300,000 |
| 9LB24403 | 10/31/58 | 10/31/61 | 100,000 | 300,000 | 300,000 |
| LB24688 | 10/31/61 | 6/17/62 | 100,000 | 300,000 | 300,000 |
| LB24688 (End) | 6/18/62 | 10/31/64 | 500,000 | 500,000 | 500,000 |
| LB24913 | 10/31/64 | 10/31/67 | 500,000 | 500,000 | 500,000 |
| ALB25120 | 10/31/67 | 10/31/72 | 500,000 | 500,000 | 500,000 |
| Affiliated FM Insurance Co. | | | | | |
| GLA71255 | 10/31/72 | 1/22/73 | 500,000 | 500,000 | 500,000 |
| GLA72342 | 1/22/73 | 12/31/73 | 500,000 | 500,000 | 500,000 |
| GLA71886 | 12/31/73 | 1/10/75 | 400,000 | 400,000 | 400,000 |
| Illinois National Insurance Co. | | | | | |
| GLA953273 | 1/10/75 | 1/12/76 | 300,000 | 300,000 | 300,000 |
| The Travelers Indemnity Co. of Rhode Island | | | | | |
| 650-862A376-4-TRI-76 | 1/12/76 | 11/08/76 | 500,000 | 500,000 | 500,000 |
| Liberty Mutual Insurance Co. | | | | | |
| LGI-632-004010-126 | 11/08/76 | 1/01/78 | 1,000,000 | 1,000,000 | 1,000,000 |

## APPENDIX B

| INSURER | POLICY PERIOD | INSURING AGREEMENT | POLICY PERIOD/ TERRITORY | RELATION TO OTHER INSURANCE | DEFINITIONS |
|---|---|---|---|---|---|
| INA | 10/31/55-10/31/58 | To pay on behalf of insured . . . for damages because of bodily injury . . . caused by accident | This policy applies only to such injuries and damages occurring during the policy period . . . | Excess over other valid and collectible insurance | Bodily injury . . . shall be construed to include sickness, disease . . . |
| INA | 10/31/58-10/31/61 | Same | Same | Same | Same |
| INA | 10/31/61-6/18/62 | Same | | Same | Same |
| INA | 6/18/62-10/31/64 (endorsement) | To pay on behalf of insured . . . for damages because of bodily injury . . . caused by occurrence | Same | Same | Bodily injury . . . shall be construed to include sickness, disease . . .<br>Occurrence means either an accident happening during the policy period or a continuous or repeated exposure which . . . causes injury during the policy period |

| INSURER | POLICY PERIOD | INSURING AGREEMENT | POLICY PERIOD/ TERRITORY | TO OTHER INSURANCE | DEFINITIONS |
|---|---|---|---|---|---|
|  | 10/31/64-10/31/67 | To pay on behalf of insured . . . as damages because of bodily injury | This policy applies only to occurrences which take place during the policy period | Excess over other collectible insurance with any other insurer | Bodily injury means bodily injury, sickness, disease . . .<br>As respects property damage liability, occurrence means either an accident happening during the policy period or a continuous or repeated exposure to conditions which unexpectedly and unintentionally causes injury to or destruction of property during the policy period |
|  | 10/31/67-10/31/70 (renewal through 10/31/72) | To pay on behalf of insured . . . as damages because of bodily injury . . . caused by an occurrence | This policy applies only to bodily injury . . . which occurs during the policy period | Primary; contains formula where other insurance applies on same basis . . . | Bodily injury means bodily injury, sickness or disease . . .<br>As respects property damage liability occurrence means an accident, including injurious exposure to conditions, which results, during the policy period, in property damage neither expected nor intended from the standpoint of the insured. |

| INSURER | POLICY PERIOD | INSURING AGREEMENT | POLICY PERIOD/ TERRITORY | INSURANCE RELATION | DEFINITIONS |
|---|---|---|---|---|---|
| Affiliated | 10/31/72-1/22/73 | Will pay on liability of insured . . . as damages because of bodily injury . . . caused by an occurrence | This policy applies only to bodily injury . . . which occurs during the policy period . . . | Same | Bodily injury means bodily injury, sickness or disease . . .<br>Occurrence means an accident, including injurious exposure to conditions, which results during the policy period in bodily injury neither expected nor intended from the standpoint of the insured |
| Affiliated | 1/23/73-12/31/73 | Will pay on behalf of the insured . . . as damages because of bodily injury . . . caused by an occurrence | This policy applies only to bodily injury . . . which occurs within the policy territory | Same | Bodily injury means bodily injury, sickness or disease, which occurs during the policy period . . .<br>Occurrence means an accident, including continuous or repeated exposure to conditions which results in bodily injury . . . |

| INSURER | POLICY PERIOD | INSURING AGREEMENT | POLICY PERIOD/ TERRITORY | RELATION TO OTHER | DEFINITIONS |
|---|---|---|---|---|---|
| **Affiliated** | **12/31/73-<br>1/10/75** | **Will pay on behalf of the insured . . . as damages because of bodily injury . . . caused by an occurrence** | **This policy applies only to bodily injury . . . which occurs within the policy territory** | **Same** | **Bodily injury means bodily injury, sickness or disease . . . which occurs during the policy period . . .**<br>**Occurrence means an accident, including continuous or repeated exposure to conditions which results in bodily injury . . .** |
| **Illinois** | **1/10/75-<br>1/12/76** | **Same** | **Same** | **Same** | **Definition of bodily injury same as above**<br>**Definition of occurrence same as above** |
| **Travelers** | **1/12/76-<br>11/ 8/76** | **Same** | **This policy applies during the policy period as described in such sections** | **Same** | **Definition of bodily injury same as above**<br>**Definition of occurrence same as above** |
| **Liberty Mutual** | **11/ 8/76-** | **Same** | **This policy applies only to bodily injury . . . which occurs within the policy territory** | **Same** | **Definition of bodily injury same as above**<br>**Definition of occurrence same as above** |

MERRITT, *Circuit Judge*, dissenting. As the Court states in its thoughtful opinion, this is an unusual case with far-reaching effects on injured workers, the insurance industry and asbestos manufacturers. The case presents an issue that probably deserves legislative consideration and resolution.

Asbestosis is a disease that progresses through three stages: the "exposure" stage, the "discoverability" stage, and the "manifestation" stage. It begins with exposure to asbestos fibers and remains latent or undiscoverable in the first stage; later it reveals itself as a network of scars on the lung tissue discoverable by X-ray; and then in the advanced stage of the disease it becomes "manifest" to the victim and diagnosable through physical symptoms such as shortness of breath, fatigue, clubbing of the fingers, or secretion of mucoid sputum. The question is: When does the coverage of a liability insurance carrier begin for the disease of asbestosis?

There is a better solution to the problem than either of the extremes proposed by the litigants, *i.e.*, the "manifestation" theory and the "exposure" theory. Our Court, and also District Judge Feikens in a comprehensive opinion, reported at 451 F.Supp. 1230 (E.D. Mich. 1978) have adopted the exposure theory. In my view, a carrier's coverage should begin with the second or discoverability stage.

## A. THE "EXPOSURE" RULE

The exposure theory, although appealing on first reading, is at odds with insurance and tort law and fairness. This rule is not satisfactory because some asbestos may be safely inhaled without the disease ever developing. With more exposure, some harm may later develop but remain latent for a significant number of years. Insurance law does not impose liability or coverage until some identifiable harm arises. An indemnifiable act does not occur at the time of the negligent act, but at the time the legally recognizable harm appears. Thus if a worker were tortiously exposed to asbestos and no "bodily injury, sickness or disease" arose for x number of years, then the only insurers liable are those whose policies were in effect x years after exposure. *See Mann v. Mann,* 133 Ill. App.2d 327, 273 N.E.2d 40 (1971); *Great American Ins. Co. v. Tinley Park Recreation Com.,* 124 Ill.App.2d 19, 259 N.E.2d 867 (1970); *Muller Fuel Oil Co. v. Insurance Co. of North America,* 95 N.J. Super. 564, 232 A.2d 168 (1967); *see generally* Annot., 57 A.L.R.2d 1385, 1389; *Remmer v. Glen Falls Indemnity Co.,* 140 Cal. App.2d 84, 295 P.2d 19 (1956) (where land negligently graded and mudslide occurred 5 years after grading, insured event is at time of slide, not time of negligent grading).

The words "bodily injury, disease or sickness" are not specifically defined in the policies. Accordingly, they should be given their normal common law or traditional insurance law meaning. At the time of initial exposure, a victim could not successfully bring an action against the manufacturer because at that time he has suffered no compensable harm. Assuming harm may eventually arise in the future, the common law generally views future damage as too speculative until the victim can at least prove a probability of harm. *See, e.g., Jeffrey v. Chicago Transit Authority,* 37 Ill. App.2d 327, 185 N.E.2d 384 (1962); *see generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30, at 143 (4th ed. 1971).

A similar principle guides both property insurance cases (see cases cited in the preceding paragraphs) and health insurance cases. *See, e.g., Broccolo v. Horace Mann Mut. Cas. Co.,* 37 Ill.App.2d 493, 186 N.E.2d 89 (1962);

*Craig v. Central Nat. Life Ins. Co.*, 16 Ill.App.2d 344, 148 N.E.2d 31 (1958); *Kissel v. Beneficial Nat. Life Ins. Co.*, 64 N.J. 555, 319 A.2d 67 (1974); *see generally* Annot., 53 A.L.R.2d 686, 688-89 (1957) (no disease unless diagnosable with reasonable medical certainty). In both lines of cases, latent conditions that are not discoverable with a reasonable certainty do not amount to an event or condition that triggers indemnification liability. In this case to detect the scarring caused by any one of an initial batch of inhaled fibers might require many random samplings of tissue from numerous different parts of the lung. Obviously this is neither a practical nor reliable process.

## B. THE "MANIFESTATION" RULE

The insurance companies other than Travelers argue that we should adopt the manifestation rule. This rule would impute liability to the insurer only when the disease actually "manifests" itself through physical symptoms such as shortness of breath or through other symptoms that are actually medically diagnosed as indicia of asbestosis.

There are several difficulties with this rule. Such a rule construes the ambiguities of the words "disease" and "occurrence" most favorably to the insurer rather than the insured. In addition, the rule would most likely result in no coverage at all in the future. Insurance companies know which particular manufacturers over the years have generated a large risk pool of victims whose disease may become manifest. Carriers, knowing that they would otherwise have to pay the full unprorated amount of a number of asbestosis claims, would most likely refuse to insure such manufacturers.

In addition, the medical evidence indicates that asbestosis is a harmful, discoverable disease before it reaches the advanced or "manifestation" stage. The health insurance cases hold that a disease may exist if it is diagnosable with reasonable medical certainty. They do not require that the disease must be diagnosed as such in order to determine the beginning date of coverage.

## C. THE "DISCOVERABILITY" RULE

Asbestosis is a discoverable disease long before it reaches the advanced stage of manifestation. We should adopt the discoverability rule. This rule is more consistent with the medical evidence and the case law since it is tied statistically to the development of a diagnosable disease. X-ray evidence, although sometimes only a harbinger of outward disability, is legally sufficient to constitute "disease" under the health insurance cases.

The health insurance cases turn on the concept of latency. A condition which is not latent is a disease, and latency is defined in terms of being discoverable with reasonable medical certainty. Thus the initial microscopic scarring, observable solely by taking a lung biopsy (*i.e.*, cutting into the lung itself), is a latent condition because of the unreliable and extraordinary measures necessary for medical detection. But X-rays are a relatively reliable, commonplace means of medical diagnosis. Once asbestosis is detectable by X-ray it is therefore not latent.

It would be reasonable for the insured to expect that once X-ray pathology becomes evident the "disease" "occurs" (given the ambiguity of these words) under the insurance contract at that time. *See* Keaton, *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv. L.Rev. 961, 973 (1970) ("[T]he principle of honoring reasonable expectations, though only occasionally recognized explicitly, is a better explanation of results in many cases than a strained rationale such as that . . . of resolving ambiguities against the insurer.") Under the common law notion of harm, moreover, the possibility of impending manifestation, if not already a reality, is far less speculative at the time of X-ray diagnosis than at initial exposure. One expert testified that once X-ray pathology becomes evident, the condition tends to worsen without further exposure.

In order to make the discoverability rule judicially and administratively manageable, I must draw a somewhat arbitrary line. The typical victim will not bring suit against a manufacturer until the disease has manifested itself. At this point it will be impractical if not medically impossible for anyone to determine retrospectively when asbestosis was first "discoverable" by X-ray. Yet an insured does not expect his claim to be defeated because of the difficulty of ascertaining the precise date the disease became discoverable.

Although not entirely satisfactory, I can find no better rule than a rule that the "disease" of asbestosis "occurs" ten years from the date of first exposure. Every further exposure will be an additional compensable injury. Liability would thus be prorated by length of policy term among all insurers whose policies were (1) in force ten years beyond initial exposure to any manufacturer's product and (2) also in force during a specific interval in which the victim was exposed to a product of Forty-Eight. In the unlikely event that asbestosis manifests itself before the tenth anniversary of initial exposure, the insurer whose policy is in effect at manifestation would be liable.

This ten year rule relieves the insurance companies from liability for periods during which the disease is in its latent stage. The rule prevents insurance companies from defeating coverage entirely or from shifting losses to another when they know, as a matter of statistical probability, that great numbers of victims have diagnosable asbestosis and are on the verge of manifesting the disease and filing a claim.[1]

The ten year rule represents a compromise. I believe, however, that this compromise is supported by the medical evidence. On deposition, Dr. George Wright testified

> . . . there are some bits of information about the [X-ray detection] in some settings where the exposures have been to our knowledge quite heavy. People begin to show X-ray abnormalities about seven to eight years after the onset of this experience of being exposed. Now, mind you, they are exposed all during that time, but turn that around, it says people can be heavily exposed to asbestos and give no overt evidences of it for seven, eight, or ten years.
>
> . . . if you saw it for the first time in 1977 for the simple reason that nobody looked back before that time, it might have been there since, oh, 1965, ten years after the beginning of exposure.
>
> According to the deposition of Dr. Henry Anderson:
>
> . . . under certain circumstances you can see X-rays [sic] changes within five years . . . .
>
> In our studies of insulation workers, roughly one thousand chest x-rays taken, individuals with less than ten years from the onset of their first exposure, ten percent of them had abnormal x-rays. Those with forty years from onset, roughly 90 percent had abnormal x-rays. . . .

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[1] There is nothing unusual or outside the common law tradition about such a 10-year rule. The common law has many times had to draw similar arbitrary lines. The 21-year rule developed by the common law in adverse possession cases and the equitable doctrine of laches are two examples. Many others could be cited.

> Given a man's exposure, somebody with twenty years, probably you can say it may well have started to have changes after ten that would perhaps be detectable.

Because the ten year average may be predicated on "heavy exposure," I could have selected a greater number. Presumably lighter periodic exposure would result in a lengthier latency period. But the medical evidence in the record supports no better compromise. I must choose some number, and I am inclined to choose one that serves to promote coverage.

A rule that is occasionally overinclusive provides compensating public benefits that an underinclusive rule lacks. It better spreads losses that the parties claim were unforeseen by the industry as a whole. As a rule of construction it also tends to reduce the costs of future accidents by placing the burden of liability on insurers best able to evaluate the risks of hazardous activity and best able to deter or minimize the ultimate tort costs of that activity. *See generally* G. CALABRESI, THE COST OF ACCIDENTS (1971) (accident costs minimized by placing ultimate liability on "least cost avoider"). The more "early" insurers that are liable upon a victim's exposure, the more likely it is that the potential harm will be discovered and the public warned. If an insurer sees that the product poses some risks, he may raise premiums accordingly. This may ultimately cause the manufacturer to remove the product from the market or to give better warnings in order to lower insurance premiums. This in turn reduces accident costs. On the other hand, imposing liability on only "later" insurers provides less incentive for early insurers to police the insured. The insured might be lulled into irresponsibility because he will not be assessed the present costs of future harm.

Accordingly, I would reverse the judgment below and adopt the "discoverability" rule outlined above.

## Judgment Entry of the Court of Appeals for the Sixth Circuit

(Filed October 21, 1980)

Nos. 78-1322, 78-1323, 78-1324,
78-1325 and 78-1326

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

INSURANCE CO. OF NORTH AMERICA,
*Plaintiff-Appellant,*

v.

FORTY-EIGHT INSULATIONS, INC.,
*Defendant-Appellee-Cross-Appellant,*

and

AFFILIATED FM INSURANCE CO., ILLINOIS NAT'L
INSURANCE CO., LIBERTY MUTUAL
INSURANCE CO.,
*Defendants-Appellants,*

and

TRAVELERS INDEMNITY OF RHODE ISLAND,
*Defendant-Appellee.*

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Before: KEITH and MERRITT, *Circuit Judges*, and PECK, *Senior Circuit Judge.*

### JUDGMENT

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Each party to pay costs on appeal.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
*Clerk*

# APPENDIX B

## Opinion of the United States District Court

(Filed May 4, 1978)

Civ. A. No. 7-71654

UNITED STATES DISTRICT COURT
E. D. MICHIGAN, S. D.

INSURANCE COMPANY OF NORTH AMERICA,
*Plaintiff,*

v.

FORTY-EIGHT INSULATIONS, INC., AFFILIATED FM INSURANCE COMPANY, ILLINOIS NATIONAL INSURANCE COMPANY, TRAVELERS INDEMNITY OF RHODE ISLAND AND LIBERTY MUTUAL INSURANCE COMPANY,
*Defendants.*

**Action was brought involving questions as to insurance carriers' duty to defend or indemnify manufacturer of asbestos products for any resultant judgments against it in numerous pending lawsuits. The District Court, Feikens, J., held that: (1) each insurer providing coverage when plaintiffs in suits against manufacturer were allegedly exposed to asbestos was obligated to defend and indemnify manufacturer, even though asbestos-caused lung disease did not manifest itself during period of insurer's coverage; (2) obligation to indemnify and to defend would be apportioned on basis of relative length of insurers' respective coverage, and (3) insured manufacturer had to bear part of judgments against it in underlying lawsuits in same proportion**

as periods in which it had no coverage bore to total period of proved exposure.

Ordered accordingly.

## OPINION

FEIKENS, *District Judge.*

A declaratory judgment is sought by the Insurance Company of North America (INA) against its former insured, Forty-Eight Insulations, Inc. (Forty-Eight), and four (4) other insurance carriers who at some time insured Forty-Eight. These four companies are Affiliated FM Insurance Company (Affiliated FM), Illinois National Insurance Company (Illinois National), The Travelers Indemnity Company of Rhode Island (Travelers), and Liberty Mutual Insurance Company (Liberty Mutual).

This court has jurisdiction of this case by reason of diversity of citizenship of the parties and venue is proper in this district.

The dispute raises questions as to which insurance carrier has a duty to defend and/or to indemnify Forty-Eight for any resultant judgments against it in numerous pending underlying lawsuits. An ancillary issue is whether or not Forty-Eight must share in the payment of a judgment or in the costs of defense. The plaintiffs in each of those lawsuits, either for themselves or as representatives of decedents, claim to have suffered injury or death from asbestos-caused lung diseases as a result of being exposed to Forty-Eight's products containing asbestos. As of the date of this opinion 251 underlying lawsuits have been filed throughout the United States naming Forty-Eight as a defendant. All these suits also name additional defendants—in some cases as many as twenty (20).

In a typical underlying lawsuit a plaintiff construction worker, employed for many years installing products containing asbestos, sues all of the manufacturers whose asbestos products were used at any of the construction sites at which he was employed. The amount of asbestos dust from each manufacturer's product to which such worker was allegedly exposed or what amount he inhaled during any period of exposure cannot be determined with certainty. The exposures allegedly range in duration from a few years to as long as 48 years.

Under the law of some jurisdictions in which these underlying suits are filed all of the manufacturers may be held jointly and severally liable for an entire damage award. *See, Borel v. Fibreboard Paper Products,* 493 F.2d 1076 (5th Cir. 1973); Prosser, *Law of Torts,* § 52 at 315-320 (4th Ed. 1971). In other jurisdictions the defendant manufacturers may have the burden of showing the proper apportionment of damages. *Id.* In all cases there is the potentiality that any or all of the defendant manufacturers may be held liable for damages.

The dispute between the parties in this case results from their disagreements over the interpretation of the various insurance policies issued to Forty-Eight and concern their respective rights and obligations regarding coverage and the duty to defend. During the past 50 years Forty-Eight has had at least five (5) liability insurance carriers.[1] The controversy as to coverage is whether the coverage at the time of exposure to asbestos or the coverage at the time the disease manifests itself is the relevant coverage. Plaintiff INA and three of the defendant insurance carriers argue for the application of a "manifestation theory" while Forty-Eight and Travelers advocate an "exposure theory."[2]

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[1] Forty-Eight had additional insurers, but its records of coverage prior to 1955 have been destroyed. For the purposes of this declaratory judgment action it will be considered self-insured prior to that date.

## I.

The parties have stipulated to most of the facts. In 1934 Forty-Eight, as a subsidiary of an Illinois corporation incorporated in 1923, began selling products containing asbestos. From 1923 through 1970 Forty-Eight or its predecessor manufactured and sold various types of insulation blocks and cements containing asbestos for use on boilers, pipes, fittings, elbows, and flat surfaces. In 1970 it discontinued the use of asbestos in all its products. This fact does not necessarily end the possibility of its asbestos product liability, however, in that demolition or removal of structures containing old insulating materials may cause asbestos to become airborne and may cause injury to persons employed in such activity. Given the latent periods of asbestos-caused lung disease, it is also anticipated that additional actions will be brought against Forty-Eight alleging injury from past exposure.

### A. INSURANCE COVERAGE

INA insured Forty-Eight in various policies from October 31, 1955 through October 31, 1972; Affiliated FM from October 31, 1972 through January 10, 1975; Illinois National from January 10, 1975 through January 12, 1976; and Travelers from January 12, 1976 through November 8, 1976. Liberty Mutual became an insurer of Forty-Eight on November 8, 1976 on a $100,000.00 deductible policy currently in force. The following chart shows the dates and coverage limits of the individual policies.

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[2] The parties entered into an agreement, supplemented by a stipulation in open court between Liberty Mutual and Forty-Eight to provide a defense for Forty-Eight and to handle the underlying lawsuits during the pendency of this declaratory judgment action, without prejudice to the rights of any party thereto to assert any claim or defense.

| Policy Name and Number | From | To | One Person One Accident | One Person More Than One Accident | Aggregate |
|---|---|---|---|---|---|
| Ins. Co. of North America | | | | | |
| 9LB21567 | 10/31/55 | 10/31/58 | 100,000 | 300,000 | 300,000 |
| 9LB24403 | 10/31/58 | 10/31/61 | 100,000 | 300,000 | 300,000 |
| LB24688 | 10/31/61 | 6/17/62 | 100,000 | 300,000 | 300,000 |
| LB24688 (End) | 6/18/62 | 10/31/64 | 500,000 | 500,000 | 500,000 |
| LB24913 | 10/31/64 | 10/31/67 | 500,000 | 500,000 | 500,000 |
| ALB25120 | 10/31/67 | 10/31/72 | 500,000 | 500,000 | 500,000 |
| Affiliated FM Insurance Co. | | | | | |
| GLA71255 | 10/31/72 | 1/22/73 | 500,000 | 500,000 | 500,000 |
| GLA71342 | 1/22/73 | 12/31/73 | 500,000 | 500,000 | 500,000 |
| GLA71886 | 12/31/73 | 1/10/75 | 400,000 | 400,000 | 400,000 |
| Illinois National Insurance Co. | | | | | |
| GLA953273 | 1/10/75 | 1/12/76 | 300,000 | 300,000 | 300,000 |
| The Travelers Indemnity Co. of Rhode Island | | | | | |
| 650-862A376-4-TRI-76 | 1/12/76 | 11/8/76 | 500,000 | 500,000 | 500,000 |
| Liberty Mutual Insurance Co. | | | | | |
| LGI-632-004010-126 | 11/08/76 | 1/01/78 | 1,000,000 | 1,000,000 | 1,000,000 |

The relevant policy provisions are those that define what is covered, when the coverage applies, and the definitions of the various terms used. These provisions are summarized as follows:

| INSURER | POLICY PERIOD | INSURING AGREEMENT | POLICY PERIOD/ TERRITORY | RELATION TO OTHER INSURANCE | DEFINITIONS |
|---|---|---|---|---|---|
| INA | 10/31/55-<br>10/31/58 | To pay on behalf of insured . . . for damages because of bodily injury . . . caused by accident | This policy applies only to such injuries and damages occurring during the policy period . . . | Excess over other valid and collectible insurance | Bodily injury . . . shall be construed to include sickness, disease . . . |
| INA | 10/31/58-<br>10/31/61 | Same | Same | Same | Same |
| INA | 10/31/61-<br>6/18/62 | Same |  | Same | Same |
| INA | 6/18/62-<br>10/31/64<br>(endorsement) | To pay on behalf of insured . . . for damages because of bodily injury . . . caused by occurrence | Same | Same | Bodily injury . . . shall be construed to include sickness, disease . . .<br>Occurrence means either an accident happening during the policy period or a continuous or repeated exposure which . . . causes injury during the policy period |

| INSURER | POLICY PERIOD | INSURING AGREEMENT | POLICY PERIOD/ TERRITORY | TO OTHER INSURANCE | DEFINITIONS |
|---|---|---|---|---|---|
| **INA** | **10/31/64-10/31/67** | **To pay on behalf of insured . . . as damages because of bodily injury** | **This policy applies only to occurrences which take place during the policy period** | **Excess over other collectible insurance with any other insurer** | **Bodily injury means bodily injury, sickness, disease . . .**<br>**As respects property damage liability, occurrence means either an accident happening during the policy period or a continuous or repeated exposure to conditions which unexpectedly and unintentionally causes injury to or destruction of property during the policy period** |
| **INA** | **10/31/67-10/31/70 (renewal through 10/31/72)** | **To pay on behalf of insured . . . as damages because of bodily injury . . . caused by an occurrence** | **This policy applies only to bodily injury . . . which occurs during the policy period** | **Primary; contains formula where other insurance applies on same basis . . .** | **Bodily injury means bodily injury, sickness or disease . . .**<br>**As respects property damage liability occurrence means an accident, including injurious exposure to conditions, which results, during the policy period, in property damage neither expected nor intended from the standpoint of the insured.** |

| INSURER | POLICY PERIOD | INSURING AGREEMENT | POLICY PERIOD/ TERRITORY | INSURANCE RELATION | DEFINITIONS |
|---|---|---|---|---|---|
| **Affiliated** | 10/31/72-<br>1/22/73 | Will pay on liability of insured . . . as damages because of bodily injury . . . caused by an occurrence | This policy applies only to bodily injury . . . which occurs during the policy period . . . | Same | Bodily injury means bodily injury, sickness or disease . . .<br>Occurrence means an accident, including injurious exposure to conditions, which results during the policy period in bodily injury neither expected nor intended from the standpoint of the insured |
| **Affiliated** | 1/23/73-<br>12/31/73 | Will pay on behalf of the insured . . . as damages because of bodily injury . . . caused by an occurrence | This policy applies only to bodily injury . . . which occurs within the policy territory | Same | Bodily injury means bodily injury, sickness or disease, which occurs during the policy period . . .<br>Occurrence means an accident, including continuous or repeated exposure to conditions which results in bodily injury . . . |

| INSURER | POLICY PERIOD | INSURING AGREEMENT | POLICY PERIOD/ TERRITORY | RELATION TO OTHER | DEFINITIONS |
|---|---|---|---|---|---|
| **Affiliated** | 12/31/73-<br>1/10/75 | Will pay on behalf of the insured . . . as damages because of bodily injury . . . caused by an occurrence | This policy applies only to bodily injury . . . which occurs within the policy territory | Same | Definition of bodily injury same as above<br>Definition of occurrence same as above |
| **Illinois** | 1/10/75-<br>1/12/76 | Same | Same | Same | Definition of bodily injury same as above<br>Definition of occurrence same as above |
| **Travelers** | 1/12/76-<br>11/ 8/76 | Same | This policy applies during the policy period as described in such sections | Same | Definition of bodily injury same as above<br>Definition of occurrence same as above |
| **Liberty Mutual** | 11/ 8/76- | Same | This policy applies only to bodily injury . . . which occurs within the policy territory | Same | Definition of bodily injury same as above<br>Definition of occurrence same as above |

On June 27, 1977, INA advised Forty-Eight that INA disclaimed any duty to defend or indemnify Forty-Eight under its various policies issued to Forty-Eight with respect to any lawsuits alleging asbestos-caused injury or death, as well as to any such lawsuits filed after June 27, 1977 in which a complaint alleged that the disease manifested itself after October 31, 1972, the date INA's final policy expired. Suit was thereupon filed by INA in the Northern District of Ohio and in this district. The Ohio action was adjourned pending the outcome of this declaratory judgment action. Forty-Eight has counterclaimed for declaratory judgment.

## B. MEDICAL EVIDENCE

The medical testimony of Dr. Forde A. McIver introduced at trial and the depositions of Dr. Henry Anderson and Dr. George Wright admitted into evidence deal with asbestos-caused lung diseases in detail and are in substantial agreement on all points that are relevant to the issues. Asbestos-caused lung diseases alleged in the underlying complaints and described as asbestosis, mesothelioma or bronchogenic carcinoma (also known as lung cancer) can be divided into malignant and non-malignant varieties.

Asbestosis is a non-malignant disease resulting from the inhalation of asbestos fibers of a certain length over a considerable period of time causing a bodily reaction that may eventually impair the function of the lungs. The body has several defense mechanisms that exclude from the functional areas of the lungs most of the foreign matter inhaled. It also has a mechanism for removing such matter that passes these defenses. Asbestos fibers of a certain length, however, cannot be removed and become embedded in the lung tissue in the areas where the alveoli are found and where the transfer of gases in and out of the blood takes place. Being unable to remove these minute particles of foreign matter, the body copes by walling off the particles. The walling off is done by a proliferation of fibrous cells that eventually produce a dense scar-like material in the functional area of the lungs. This process takes about six (6) months and is irreversible. Each repetition of inhalation and reaction adds a tiny deposit of scar-like tissue in this critical area.

The accumulation of scar-like tissue decreases the functional volume of the lungs, stiffens the passage ways, and impedes the transfer of gases in and out of the blood. If the process continues, the functional capacity of the lungs becomes inadequate to support normal activities and may eventually be unable to support life.

Asbestosis progresses slowly as a disease. Damage begins with the initial insult, and scar-like tissue builds up over many years before symptoms become noticeable or a diagnosis can be made. In the majority of cases symptoms do not appear until more than twenty (20) years after initial exposure. The intensity and duration of each insult as well as the frequency of repetition combine with numerous individual characteristics to determine which persons who are exposed sustain noticeable lung damage, when functional impairment becomes noticeable, and what symptoms such a person finally demonstrates. Even if after a period of exposure, no additional asbestos fibers are inhaled, tissue change may nonetheless continue and be unnoticed for decades. Since the effects of tissue changes are cumulative, an exposed person's condition is the product of an unknowable sequence of insults arranged randomly or in groups along a continuum that stretches from as long as 50 years to less than six months prior to manifestation. Additional factors such as variations in ventilation, moisture in the air, and an exposed person's health at the time of any exposure combine to make it impossible to determine which exposure to asbestos caused injury or to determine when such a person becomes "diseased."[3]

A second asbestos-caused disease, mesothelioma, is a malignant condition of cells lining the chest wall resulting in a tumor. This disease is rare except in persons who have been exposed to asbestos. The relationship between asbestos and mesothelioma is not well understood, and relatively small exposures over a period of a few years have been associated with this condition. The growth of a tumor generally follows a latent period of over 20 years during which there need not be any additional exposure. Diagnosis is possible within a short time of the beginning of tumor growth. Death follows diagnosis by less than two years in most cases. As with asbestosis it is virtually impossible to determine which exposure or exposures to asbestos cause the disease.

Bronchogenic carcinoma (lung cancer) is another malignant disease that has been associated with asbestos, at least in persons who smoke cigarettes. It also has a latent period following inhalation averaging approximately 15 to 20 years. It also progresses slowly, but can and often is diagnosed within a few years of its initial appearance.

## II.

### A. APPLICABLE LAW

In a contract diversity action such as this, Michigan conflict of law rules require the application of the law of the place where the insurance policies were issued and countersigned. *Chrysler Corp. v. Insurance Co. of North America*, 328 F.Supp. 445 (E.D.Mich.1971). The parties agree that Illinois law applies to the interpretation of all the policies except the Liberty Mutual policies, which are governed by New Jersey law. The law of both states holds that where the terms of an insurance contract are clear and unambiguous, they must be given their common and ordinary meaning. See *Canadian Radium & Uranium Corp. v. Indemnity Insurance Company of North America*, 411 Ill. 325, 104 N.E.2d 250 (1952); *Boswell v. Travelers Indemnity Co.*, 38 N.J.Super. 599, 120 A.2d 250 (1956); *Wilkinson & Son, Inc. v. Providence Washington Ins. Co.*, 124 N.J.Super. 466, 307 A.2d 639 (1973). In both states insurance contracts are to be liberally construed in favor of the insured and against the insurer. *J. L. Simmons Co. v. Fidelity and Casualty Co.*, 511 F.2d 87 (6th Cir. 1975) (applying Ill. law); *Last v. West American Co.*, 139 N.J.Super. 456, 354 A.2d 364 (N.J.1976). If there are ambiguities in the policy, or uncertainty over its interpretation, the policy is to be construed against the insurer, and in favor of the insured. *Tiffany Decorating Co. v. General Accounts Fire and Life*, 12 Ill.App.3d 597, 299 N.E.2d 378 (1973); *Bryan Construction Co. v. Employer's Surplus Lines Ins. Co.*, 60 N.J. 375, 290 A.2d 138 (N.J. 1972). See also *Corbett Co. v. Ins. Co. of North America*, 43 Ill.App.3d 624, 2 Ill.Dec. 148, 357 N.E.2d 125 (1976).

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[3] For a discussion of asbestosis and its effects on the body see Selikoff, Bader, Bader, Churg, and Hammond, "Asbestosis and Neoplasis," 42 Am.J.Med. 487 (1967); Selikoff, Churg, and Hammond, "The Occurrence of Asbestosis Among Insulation Workers," 132 Ann.New York Acad.Sc. 139 (1965).

## B. POLICY LANGUAGE AND THEORIES OF INTERPRETATION

In each policy the insurer has agreed to pay on behalf of the insured such damages as are determined because of "bodily injury" caused by an "occurrence" during the policy period. "Bodily injury" *includes* injury, sickness and disease. "Occurrence" includes a continuous or repeated exposure to conditions which result in bodily injury. INA, Affiliated FM, Illinois National, and Liberty Mutual contend that in lawsuits alleging asbestosis, mesothelioma, or lung cancer, coverage is provided by Forty-Eight's insurer at the time such a plaintiff's disease manifests itself, that is, the date on which the condition became known or should have become known to plaintiff or the date on which plaintiff's condition was medically diagnosed, whichever comes first. Relying heavily on statute of limitations and health insurance cases, these insurers argue that though there is tissue damage long before manifestation, a person cannot be considered injured or diseased until symptoms are noticeable or a diagnosis is made. They point out that an exposure may or may not result in lung damage; that only some persons who are exposed to asbestos dust inhale it; that only some of those who inhale it experience tissue change; and, that the level of tissue change only reaches the point of functional impairment in some of those who undergo such tissue change. Thus, they argue, exposure is not necessarily related to injury, and it is reasonable to say that injury or disease does not "occur" until functional impairment is noticeable.

They cite medical evidence to substantiate the contention that it is impossible to determine with any degree of certainty: (a) the correlation between the onset or progression of the disease with specific incidents of exposure; (b) the extent of damage at any particular date as the disease develops; or (c) the time at which bodily function begins to be impaired. They claim that the manifestation theory provides the only certain method of establishing coverage and advocate its adoption as a "rule of reason." *See, General Dynamics Corp. v. Benefits Review Board, et al.*, 565 F.2d 208 (2d Cir. 1977).

Forty-Eight and Travelers, on the other hand, contend that manifestation is unrelated to injury. They maintain that these liability policies are "occurrence" or "accident" policies, not "discovery" or "claims made" policies. It is their position that I would drastically reform the terms of the relevant insurance contracts if I adopt the manifestation theory. They point out that the uncontroverted medical evidence indicates that tissue damage occurs shortly after inhalation and as far back as 50 years before manifestation. They cite medical evidence to show that asbestos-caused diseases involve cumulative minute injuries and are progressive. They characterize this chain of events as a "continuing tort" and claim that this makes all insurers on the risk from the time of alleged initial exposure through manifestation jointly and severally obligated to defend and to indemnify Forty-Eight if liability is found.

Following the decision in *Borel, supra,* holding all manufacturers of asbestos products to which a claimant was exposed jointly and severally liable, some insurers began to espouse the manifestation theory for coverage determination while others continued to advocate the exposure theory. Discussions and meetings have heightened the controversy and its continued existence is demonstrated by the fact that there are insurers on both sides of the issue in this declaratory judgment action. Forty-Eight has introduced numerous items of correspondence and other documents to show that even within certain insurance companies' practices and positions relative to this coverage controversy have changed over time.

In the three years prior to INA's letter of June 27, 1977, Forty-Eight tendered the defense of approximately 150 lawsuits to INA and the other carriers involved in this action. In every instance a defense was provided—usually by INA—without a reservation of rights raising the point that manifestation of the disease must occur during the coverage period as a requirement for coverage. There is evidence that demonstrates that INA sought contribution and litigation expense arrangements with other insurers using periods of *exposure* as the determining factor. In some of the suits defended by INA without objection or reservation the manifestation date of a plaintiff's disease came after the expiration of INA's coverage. In all cases there is exposure alleged during INA's policy periods. Illinois National and Affiliated FM also each declined coverage in specific cases on grounds that the dates of exposure alleged in the complaint were outside the coverage period of their respective policies.

I accordingly conclude that the conduct and correspondence of some of the insurers in this case are instructive on the issue of interpretation of the policies involved. *Brooklyn Life Ins. Co. v. Dutcher,* 95 U.S. 410, 24 L.Ed. 410 (1877); *Weger v. Robinson Nash Motor Co.,* 340 Ill. 81, 172 N.E. 7 (1930). The meaning the parties themselves attach to the terms of the contract can be inferred from their conduct. *Philips Electronics v. Leavens,* 421 F.2d 39 (3d Cir. 1970). From such conduct it would appear that the manifestation theory appears to be a new approach and that it was this that precipitated litigation quite soon after it was put into practice by the insurers who now advocate its adoption.

## C. LEGAL IMPLICATIONS OF THE EVIDENCE

Beyond this implicit approval of the exposure theory as the correct interpretation by three of the four carriers who now oppose it, there are several other factors that compel adoption of the exposure theory of coverage. The medical evidence establishes that each tiny deposit of scar-like tissue causes injury to a lung. Each such insult causing injury is an "occurrence" for the purpose of determining which coverage applies. (This must be distinguished from any test that may be used to determine when an applicable statute of limitations begins to run in the underlying lawsuits.) This occurrence takes place within a short time after inhalation in any instance where exposure results in tissue change. It is irrelevant that not all persons who are exposed experience tissue damage; it is clear that, when a lawsuit is brought by a person who alleges an asbestos-caused lung disease, there is a strong likelihood that proof is available as to inhalation and tissue change. Each minute injury may then be a part of a "continuing tort," *Karjala v. Johns-Manville,* 523 F.2d 155 (8th Cir. 1975), and may constitute a separate occurrence. Consequently, each insurer on the risk when a currently diseased plaintiff was allegedly exposed is obligated to acknowledge coverage and to provide a defense and possibly indemnification.

To obtain a judgment against Forty-Eight, a plaintiff in an underlying lawsuit must show exposure to Forty-Eight's asbestos products. A similar showing must be made in the underlying lawsuit as to other defendant asbestos manufacturers who, it is claimed, are involved. Having shown such exposure to the products of asbestos manufacturers and the existence of disease, such a plaintiff has made out a prima facie case of injury. Such a plaintiff's inability to fix the exact time when each injury occurred does not preclude liability in a case where such injuries are cumulative and progressive, and cannot be apportioned between given points or periods of time. *Borel, supra,* at 1094.[4]

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[4] See also, Prosser, *Law of Torts,* (4 Ed. 1971), pp. 313-323, regarding apportionment of damages; Nachman, "The New Policy Provisions for General Liability Insurance," 18 The Annals, No. 3, p. 197 (Fall, 1965).

Note also the reference to injurious exposure to conditions which results in injury. This eliminates any requirement

(Continued on following page)

By analogy, each insurer of each manufacturer has coverage for the injuries allegedly caused by that manufacturer. By being on the risk during an indivisible injurious process, each insurer is rendered jointly and severally liable to defend and indemnify its insured.[5]

Any other theory of coverage would render Forty-Eight's insurance illusory. Under *Borel* and similar cases Forty-Eight may be held liable for asbestos-caused injuries occurring during the period from 1923 until 1970 when it discontinued the sale of asbestos products. If the manifestation theory is adopted, Forty-Eight would be effectively deprived of coverage it paid for and might be unable to secure coverage for liability in future cases where manifestation occurs after coverage is not available. Joint and several liability of the insurers who insured Forty-Eight at various times during the injury producing process (which I equate with exposure) is the necessary analogue of Forty-Eight's potential joint and several liability to each plaintiff in the underlying lawsuits.

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**Footnote continued—**

> that the injury result from a sudden event. Although it is most common that the injury takes place simultaneously with the exposure, there are many instances of injuries taking place over an extended period of time before they become evident. For example, slow ingestion of foreign substances of inhalation of noxious fumes. In cases such as these, the definition of occurrence serves to identify the time of loss for the purpose of applying coverage—the injury must take place during the policy period.
>
> In some exposure types of cases involving cumulative injuries, it is possible that more than one policy will afford coverage. Under these circumstances, each policy will afford coverage to the bodily injury or property damage which occurs during the policy period.

Elliott, New Comprehensive General Liability Policy, Liability Insurance Disputes Litigation Series, Practicing Law Institute, 12-3, 12-5 (1968). *Accord,* Long, Law of Liability Insurance, § 11.05A.

[5] For an analogous situation involving property damage that resulted from a process of dry rot following defective construction, *see Groul Construction v. Insurance Company of North America,* 11 Wash.App. 632, 524 P.2d 427 (1974).

## D. CONCLUSIONS OF LAW

Cases dealing with statute of limitation issues are not applicable to this coverage problem. *See, Tijsseling v. General Accident, Fire & Life Assurance Corp., Ltd.*, 55 Cal.App.3d 623, 127 Cal.Rptr. 681 (1976). Statute of limitation cases are based on public policy considerations which balance the prejudice to a defendant caused by stale claims when weighed against considerations of fairness to a plaintiff. So considered, it is at the time an asbestos-caused disease manifests itself in a way that implicates a causal relationship to the manufactured product that the public interest in limiting the time for asserting a claim attaches, and it is then that the statute of limitations begins to run. *Karjala, supra; Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949). Because of this, courts often speak of the "injury" having "occurred" at that time as a way of determining when a cause of action accrues. Discovery is a necessary requirement for a fair rule in limitations of actions cases, but, from an insurance coverage perspective, it is the injury and not its discovery that subjects a manufacturer to liability and consequently its insurer to a duty to defend and to indemnify. The alleged injury in the underlying lawsuits is the formation of scar-like tissue because of the implanting of asbestos fibers in the lungs. If this injury causes a plaintiff to suffer damages, the insurer who was on the risk at the time that that injury occurred has the relevant coverage.

INA has cited *General Dynamics, supra*, and its predecessor, *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913, 76 S.Ct. 196, 100 L.Ed. 800 (1955) as explicit support for its position that the date of manifestation of disease should control coverage. Both these cases deal with workmen's compensation awards under the Longshoremen's and Harbor Worker's Compensation Act and apply the "last insurer" of the "liable employer" rule of coverage. They are clearly distinguishable in that Congress altered the common law to further a statutory compensation scheme. This and similar state workmen's compensation schemes that establish a "last employer" or "last exposure" rule for occupational disease cases are explicitly in derogation of the common law of contracts. Such common law principles are nonetheless still applicable in this case. The courts in *General Dynamics* and *Cardillo* concluded as they did because they held that the determination by Congress as to how the equities should be balanced in arriving at a comprehensive compensation scheme had to be followed. In this case I am bound to apply the contract laws of Illinois and New Jersey, and I am not permitted to determine public policy which may be in derogation of the common and statutory law of those states. If such is to be done, it must be done through legislative action.

There is no support in the insurance policies in this case for the contention that bodily injury must manifest itself during the policy period to invoke coverage. Such a requirement could have easily been drafted within the definition of "occurrence"—assuming that such a restriction would not be contrary to public policy. *Stauffer Chemical Co. v. Ins. Co. of North America*, 372 F. Supp. 1303 (S.D. N.Y. 1973) concerned an "occurrence" policy. Stauffer manufactured a product that was intended to protect potato seedpieces against "seed rot" and "damp off." It was shown that the product was not effective in so doing. INA denied coverage on the ground that the policy did not apply to liability which arose out of the ineffectiveness or failure of the product to perform as represented. INA said that there was no occurrence within the meaning of the policy because the conditions that caused injury were not

Stauffer's product—it was rather the failure to prevent such conditions that caused injury. The court rejected this interpretation:

> However, it was not made a condition of coverage with respect to the definition of occurrence in the instant policy that the condition causing the injury be created by the insured, and the court may not inject a clause into the policy or make a new contract for the protection of the insurer. *Id.* at 1306.

*Stauffer* provides guidance in the matter of construction of insurance contracts, but it also meets INA's contention in this case that any given exposure cannot be an occurrence because it did not cause the worker to become diseased, that it merely made such a disease possible when the effects of additional exposures were added to it.

The proponents of the manifestation of disease theory cite case law holding that the time when the injury or damage occurs and not the time when the negligent act occurs determines insurance coverage. *See, e. g., Peerless Ins. Co. v. Clough,* 105 N.H. 76, 193 A.2d 444 (1964); *Remmer v. Glen Falls Indemnity Co.,* 140 Cal.App.2d 84, 295 P.2d 19 (1956); Annotation 57 ALR2d 1385. They argue that there is an implicit analogy between the negligence-injury sequence in those cases and the exposure-disease (severe enough to manifest itself) sequence alleged in the underlying lawsuits. This analogy is rejected. The negligent acts alleged in the underlying lawsuits occurred when the products were sold without sufficient warning, not when the plaintiffs were exposed. The medical evidence in this case indicates clearly that injury to lung tissue occurs soon after exposure, not when the disease manifests itself.

Two recent United States District Court cases deal with occurrence policies in this context. In *Porter v.*

*American Optical,* Civil Action No .75-2202 (E.D.La., entered November 23, 1977) (cited by INA) an asbestos worker who was diagnosed as having asbestosis, sued the manufacturer of a respirator alleging that his disease was caused by defects in the apparatus as well as defendant's failure to warn him of the danger involved in its use. Following a jury verdict and based on some of the evidence adduced at trial the court found that the insurer on the risk at the time of manifestation had to afford coverage even though another insurer also had an occurrence policy and had been on the risk throughout much of the period during which the plaintiff was exposed to asbestos. The court equated "bodily injury" with sickness or disease sustained by any person," and found that the manifestation of the disease was the occurrence that triggered coverage. Such a construction is not warranted here. While the definition of bodily injury *includes* sickness or disease in the policies before me, the definition also specifically includes injury to the body within its terms. Because of the extensive medical testimony that tissue injury is sustained long before a worker can be termed diseased, the plain meaning of the term "bodily injury" requires coverage at the time of the insult of asbestos that follows upon exposure. *Porter* is also distinguishable in that it deals with coverage of the liability of a manufacturer of a respirator, not a manufacturer of asbestos products. The liability of a manufacturer of a product designed to prevent injury from an inhaled subtance may be materially different from the liability of the manufacturer of the deleterious substance inhaled.

The second case is *Tenneco Chemicals v. Employers Mutual Liability Ins. Co.,* 76 Civ. 809 (S.D.N.Y., filed April 8, 1977) (cited by Forty-Eight). In the underlying lawsuit to that case, the plaintiff had been injected with a radioactive drug for testing purposes. The drug was defective in that it underwent atomic decay, breaking down into new elements and emitting harmful radiation during a 23-year period while lodged in plaintiff's body. Employers Mutual Liability Insurance Company was on the risk as an insurer for an eight-year period from two years after the injection until ten years after the injection. The policy provisions are the same as those before me in this case. The court there held that occurrence coverage is perhaps the broadest possible coverage and that injury caused by the drug was sustained during Employers' coverage period. This injury was held to be an occurrence for the purpose of determining coverage even though the condition of the plaintiff in the underlying lawsuit was not diagnosed until more than eleven years after the policy expired. *Tenneco Chemicals* is solid support for my holding.

## III.

## IMPLICATIONS OF THE ADOPTION OF EXPOSURE THEORY

The language of the various policies, the medical evidence as to bodily injury, and the reality of joint and several liability in the underlying lawsuits combine to mandate the adoption of the exposure theory of coverage. This conclusion, however, leaves several questions unanswered. How is the duty to indemnify to be apportioned? What is the liability of Forty-Eight in its self-insured status? How is "stacking" of policy limits to be avoided?

In underlying cases in which Forty-Eight is held liable, it will in all likelihood be held jointly and severally liable with other manufacturers for all damages caused by an indivisible injury.[6] This may ultimately result in an equal

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[6] In the event that special questions to the jury or the post-trial certification of the judge establishes the dates of exposure to the products of each manufacturer, the judgment could be ap-

(Continued on following page)

sharing of the payment of the judgment or in some negotiated formula for payment by each manufacturer found liable. Since each insurer covered Forty-Eight for differing periods of time, the obligation to indemnify should be apportioned on the basis of the relative lengths of their respective coverage periods.

As explained in footnote 5, *supra*, the indivisible and cumulative nature of the injuries and the possibility of a joint and several judgment may render Forty-Eight liable for all damages caused by an injury, some portion of which was caused by exposure to asbestos occuring *after* 1970 when Forty-Eight stopped manufacturing asbestos products. It is also possible that Forty-Eight may be held liable for all of the damages caused by an injury, some portion of which was caused by exposure to asbestos products of other manufacturers *before* a plaintiff was exposed to Forty-Eight's products. This application of the doctrine of joint and several liability, in addition to providing a remedy when the cause or time of the injury cannot be determined precisely, is appropriate because the medical evidence shows that all insults to lung tissue from asbestos combine to cause functional impairment. Insults occurring before and/or after exposure to Forty-Eight's products would not cause the same injury if it were not for the insults that resulted from exposure to those products.

Since part of the injurious process for which Forty-Eight may be held liable in an underlying lawsuit may occur before 1955, or at some time in the future when

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Footnote continued—

portioned on the basis of the relative lengths of the periods of exposure. It should be noted that this opinion deals only with insurance coverage and does not in any way address or establish what the liability of Forty-Eight may be in any underlying lawsuit.

it is uninsured, it must bear a part of such judgment in the same proportion as the periods during which it had no coverage bear to the total period of proved exposure. This does not render Forty-Eight's coverage illusory; the insurers have a duty to indemnify Forty-Eight for judgment liability for the injuries that are apportioned for the periods of their respective coverages, while Forty-Eight must bear judgment liability for injuries apportioned to the period when it had/has no coverage.[7]

The table of coverage, *supra*, shows that different individual policies were in effect for varying lengths of time and had differing limits of liability. It might be argued that since an injury occurs each time an asbestos fiber insults the tissue of a lung, the policy limits for each policy period could be "stacked" to produce a coverage liability in any given case that would be many times the aggregate limit of any one policy. Forty-Eight has stated on the record that it does not seek to stack coverages in this way. In any event, no insurer should be held liable in any one case to indemnify Forty-Eight for judgment liability for more than the highest single yearly limit in a policy that existed during the period of the claimant's exposure for which judgment was obtained.

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7. A hypothetical case may clarify this point. Assume, in addition to the facts as to coverage in this case, that Forty-Eight has liability coverage for asbestos-related injuries through 1979, but not thereafter. Assume further an award through a joint and several judgment to a plaintiff who was found to have been exposed to asbestos dust from January 1, 1945 to December 31, 1984. Also, assume that the proofs show that the plaintiff was exposed to the asbestos products of manufacturers X and Y from 1945 to 1950, to the products of Forty-Eight, and manufacturers X, Y, and Z from 1950 to 1970, and to the products of manufacturers Y, Z, and A from 1970 through 1985. Each insurer would be obligated to indemnify Forty-Eight for 1/40th of the judgment for each year that it was on the risk. Since Forty-Eight was self-insured or uninsured during portions of this peroid it would likewise be obligated to pay a portion of the judgment for each year of exposure during which it had no coverage—in this example 15/40ths.

Various aspects of these questions may arise. Insurers will be able to resolve many, if not all, of these questions since they possess great skills in the compromise and settlement of disputes.

## IV.

## THE DUTY TO DEFEND

The duty to defend requires additional comment in that it is distinguishable from and in some ways broader than the duty to indemnify. *Sprayregen v. American Indemnity Co.*, 105 Ill.App.2d 318, 245 N.E.2d 556 (1969); *McFadyen v. North River Insurance Co.*, 62 Ill.App.2d 164, 209 N.E.2d 833 (1965). Each of the relevant policies contains a provision that the insurer will defend any suit against its insured that alleges injury, sickness, or disease and seeks damages on account thereof even if such suits are groundless, false or fraudulent. None of the policies contains language that makes manifestation a factor in determining whether or not there is a duty to defend.

In *Maryland Casualty Co. v. Peppers*, 64 Ill.2d 187, 355 N.E.2d 24 (1976), the Illinois Supreme Court said:

> In determining whether the insurer owes a duty to the insured to defend an action brought against him, it is the general rule that the allegations of the complaint determine the duty. If the complaint alleges facts within the coverage of the policy or potentially within the coverage of the policy the duty to defend has been established. (Citations omitted).
>
> This duty to defend extends to cases where the complaint alleges several causes of action or theories of recovery against an insured, one of which is within the coverage of a policy while the others may not be. (Citations omitted). 64 Ill.2d at 193-195, 355 N.E. 2d at 28.

New Jersey law is to the same effect. *See, Burd v. Sussex Mutual Ins. Co.*, 56 N.J. 383, 267 A.2d 7 (1970).

The cumulative and indivisible nature of the injuries alleged in an underlying lawsuit may result in a judgment holding Forty-Eight jointly and severally liable for all of a plaintiff's damages. The cumulative and indivisible nature of the injuries also makes it impossible to determine when any given portion of such injuries occurred. Consequently, the resulting judgment relates to the entire period of exposure and must be apportioned by the length of each insurer's coverage. Query whether it necessarily follows that the duty to defend or bear the cost of defense should also be apportioned in this way. The public policies behind such an apportionment of the duty to indemnify do not exist with the same force as to the duty to defend. It might be contended that the insurer on the risk at the time the suit is brought, or the manufacturer if it is uninsured at the time the suit is brought, should assume all of the responsibilities and costs of defense. This might, however, result in unequal treatment of the various insurers. What is more, the defense of lawsuits that arise out of injuries caused during a policy period is one of the benefits Forty-Eight paid premiums for and is entitled to receive.

The apportionment of the duty to indemnify should be accompanied by a similar apportionment of the costs of defense. These costs must also be apportioned over the entire period during which the alleged injuries occurred to reflect the cumulative and indivisible nature of the process that gave rise to the cause of action. The duty to defend as established by this method will be coextensive with the duty to indemnify. In every case in which an insurer (or insurers) has coverage and there is a possibility that because of the allegations of a complaint it may be called upon to indemnify Forty-Eight, it also has a duty to defend or share in the costs of defense. These costs, if originally borne by one insurer, should be apportioned among all insurers under a duty to defend by the number of years of exposure for which each insurer provided coverage.

Since Forty-Eight is to be considered self-insured prior to 1955 and may well be uninsured in the future, it will also be obligated to bear such defense costs in direct proportion to the other insurers as stated above. It would be anomalous to hold that Forty-Eight is liable for a portion of a judgment because part of the alleged injury occurred when it had no coverage but allow it to avoid the costs of defending the suit for that period. As mentioned, *supra*, the policies involved are not "claims made" policies that provide coverage and defense only if a claim is brought within the policy period, but rather "occurrence" policies that provide coverage and defense for injuries that occur within the policy period. Since a portion of the injury is allocated to the period for which Forty-Eight is considered self-insured, it must be treated as an insurer, and a portion of the defense costs must be allocated to that period.[8]

Since notice pleading was adopted, it has been held that an insurer has a duty to defend even if there is a doubt whether a complaint against an insured comes within the coverage of a policy. This duty to defend continues "until such time as the claim against the insured is confined to a recovery that the policy did not cover."

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[8] The following hypothetical case illustrates this apportionment. Assume that Forty-Eight has coverage for asbestos-caused injuries through 1979, but not thereafter. Assume further that a lawsuit is brought in 1986 and that the plaintiff alleges exposure to asbestos dust from January 1, 1965 to December 1, 1984. Forty-Eight must assume the defense and ultimately pay 5/20ths of the cost of the defense.

*Carboline Co. v. Home Indemnity Co.*, 522 F.2d 363 (7th Cir. 1975) (applying Illinois law and citing numerous cases). Many of the underlying complaints allege general dates of exposure, and since exposure determines coverage, such an allegation is sufficient to trigger the duty to defend. *Burger v. Continental Nat. Am. Group,* 441 F.2d 1293 (6th Cir. 1971). If more than one insurer was on the risk during the alleged periods of exposure, they will be jointly and severally obligated to assume the defense. In those cases where no specific dates of exposure are alleged, the insurer providing coverage on the date the suit is filed must undertake the defense.[9] This duty, likewise, will fall upon Forty-Eight for suits that are brought in a period in which it has no coverage. In these suits as well as in instances where, because of exposure prior to 1955 it could ultimately be liable for a substantial part of the judgment, Forty-Eight may want to assume control of the defense in any event. If it does, it will be entitled

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9. If pretrial discovery uncovers specific dates of exposure which indicate that the current insurer cannot be held liable to indemnify Forty-Eight, that insurer may tender the defense to the insurer (or insurers) who could be held liable. An insurer faced with such a tender either from the current insurer or from its insured must assume the defense or make arrangements for sharing the cost of the defense. *See, Liberty Home Improvement v. Royal Globe Ins. Co.*, CCH Auto Cas. 17, 682 (¶ 9394) (Tenn.App.1977). Due regard must be given to possible conflicts of interest.

When the duty to defend arises as a question between insurers it is proper to go outside the complaint to make this determination. This is particularly so because of notice pleading. Long, Law of Liability Insurance § 502 (1976); *see also, Hartford Acc. & Indemnity Co. v. Allstate Ins. Co.*, 5 Ohio App.2d 287, 215 N.E.2d 416 (1966). Once it has been established by the investigation of the current insurer that the dates of exposure place the duty to defend on a prior insurer, the current insurer is entitled to be reimbursed for the costs of defense it has incurred.

This court notes that a pragmatic approach would be to seek a determination of underlying liability before any attempt is made to fix the duty to defend.

to be reimbursed for such part of the costs of that defense by any insurer who would be obligated to pay part of a judgment.

This opinion constitutes the required findings of fact and conclusions of law.

An appropriate order has been entered.

## APPENDIX C

### Other Declaratory Judgment Actions Involving Manifestation-Exposure Coverage Dispute in Connection With Asbestos Litigation

1. *A C and R Insulation Co., Inv. v. Firemen's Fund Insurance Co.,* No. 350-81 (D.C. Super. Ct.)
2. *American Motorist Insurance Co. v. Phillip Carey Corp.,* No. 79-0518 (S.D. N.Y.)
3. *American Mutual Liability Ins. Co. v. Eastern Refractories Co.,* No. 80-3768 (Mass. Super. Ct., Middlesex Div.)
4. *Armstrong Cork Co. v. Aetna Casualty & Surety Co.,* No. C-315367 (Cal. Super. Ct., Los Angeles County)
5. *Asten Group v. Commerce & Industry Insurance Co.,* No. 58 19 (Pa. C.P., Philadelphia County)
6. *Centennial Insurance Co. v. North American Asbestos Co.,* No. 80-CH43 (Ill. Cir. Ct., McLean County)
7. *Celotex Corp. v. Aetna Casualty & Surety Co.,* No. 79-5885 (Fla. Cir. Ct., Hillsborough County)
8. *Crown Cork & Seal v. Aetna Casualty & Surety Co.,* No. 1292 (Pa. C.P., Philadelphia County)
9. *Commercial Union Ins. Co. v. Johns-Manville Corporation,* No. 80-306-N (D. Mass.)
10. *Commercial Union Ins. Co. v. Sepco Corp.,* No. 81-769 (E.D. La.)
11. *Commercial Union Ins. Co. v. Pittsburgh Corning Corp.,* No. 81-2129 (E.D. Pa.)
12. *Commercial Union Ins. Co. v. Unarco Industries, Inc.,* No. 81L 802 (Ill. Cir. Ct., Cook County)

13. *Eagle Picher Industries, Inc. v. Liberty Mutual Insurance Co.*, No. 78-2739 (D. Mass.)

14. *Fireman's Fund Insurance Co. v. Fibreboard Corp.*, No. 753-885 (Cal. Sup. Ct., San Francisco County)

15. *GAF Corp. v. Insurance Company of North America*, No. C-286217 (Cal. Sup. Ct., Los Angeles County)

16. *Insurance Company of North America v. Nicolet Industries, Inc.*, No. 971955 (Ohio C.P., Cuyahoga County)

17. *Johns-Manville Corp. v. Home Insurance Co.*, No. 765226 (Cal. Super. Ct., San Francisco County

18. *Keene Corp. v. Insurance Company of North America*, No. 78-1011 (D.D.C. Jan. 30, 1981), appeal docketed No. 81-1248 (D.C. Cir. March 5, 1981)

19. *Liberty Mutual Insurance Co. v. Armstrong Cork Co.*, No. 80-429-G (D. Mass.)

20. *Porter v. American Optical Corp.*, No. 75-2202 (E.D. La., Nov. 25, 1977 and March 28, 1978) 641 F.2d 1128 (5th Cir.) time for filing petition for certiorari extended to Sept. 7, 1981.

21. *Standard Asbestos Manufacturing & Insulating Co. v. Royal Indemnity Insurance Co.*, No. CV80-14909 (Mo. Cir. Ct., Jackson County)

22. *Zurich Insurance Co. v. Raybestos Manhattan, Inc.*, No. 78-L-8760 (Ill. Cir. Ct., Cook County)

## APPENDIX D

**28 U.S.C. §1254(1)**

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * * * *

**Ill. Rev. Stat. Ch. 48 Section 172.36(d) (1975)**

* * * * *

(d) In this Act the term "Occupational Disease" means a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public.

A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence.

An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists; provided however, that in a claim of exposure to atomic radiation, the fact of such exposure must be verified by the records of the central registry of radiation exposure maintained by the Department of Public Health or by some other recognized governmental agency maintaining records of such exposures whenever and to the extent that the records are on file with the Department of Public Health or the agency.

The employer liable for the compensation in this Act provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease claimed upon regardless of the length of time of such last exposure, except, in cases of silicosis or asbestosis, the only employer liable shall be the last employer in whose employment the employee was last exposed during a period of 60 days or more after the effective date of this Act, to the hazard of such occupational disease, and, in such cases, an exposure during a period of less than 60 days, after the effective date of this Act, shall not be deemed a last exposure. If a miner who is suffering or suffered from pneumoconiosis was employed for 10 years or more in one or more coal mines there shall, effective July 1, 1973 be a rebuttable presumption that his or her pneumoconiosis arose out of such employment.

If a deceased miner was employed for 10 years or more in one or more coal mines and died from a respirable disease there shall, effective July 1, 1973, be a rebuttable presumption that his or her death was due to pneumoconiosis.

The insurance carrier liable shall be the carrier whose policy was in effect covering the employer liable on the last day of the exposure rendering such employer liable in accordance with the provisions of this Act.

# APPENDIX E

## Corporations Affiliated With Petitioner Insurance Company of North America

The parent company of Insurance Company of North America (INA) is INA Financial Corp., a subsidiary of INA Corp. The following corporations are affiliates of INA: Life Insurance Co. of North America; INA Life Insurance Co.; Horace Mann Life Insurance Co.; Hospital Affiliates International, Inc.; and AID, Inc. The following corporations are subsidiaries of INA: Alaska Pacific Insurance Co.; INA Insurance Co. of Illinois; INA Insurance Co. of Ohio; Indemnity Insurance Co. of North America; F.S. Titles Services, Inc. and its affiliates, Fidelity National Title Insurance Co. and Southern Title Guaranty Co., Inc.

# Supplemental Brief

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Nos. 81-198 and 81-199

IN THE

# Supreme Court of the United States

OCTOBER TERM 1981

INSURANCE COMPANY OF NORTH AMERICA
*Petitioner,*
v.
FORTY-EIGHT INSULATIONS, INC., et al.
*Respondents.*

LIBERTY MUTUAL INSURANCE COMPANY
*Petitioner,*
v.
FORTY-EIGHT INSULATIONS, INC., et al.
*Respondents.*

## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Since these two petitions for certiorari were filed on July 31, 1981, there has been an important new development of which this Court should be aware. As mentioned in the petitions, there are more than 20 other lawsuits pending in federal and state courts throughout the United States involving liability insurance coverage for asbestos-related product liability litigation. One of those actions, a federal district court action which was *sub judice* when the petitions were filed, has just been decided. That case is *Eagle-Picher Industries, Inc.* v. *Liberty Mutual Insurance Com-*

*pany, et al.*, Civil Action 78-2739-Z (D. Mass., August 14, 1981), and a copy of that decision is reproduced in the appendix hereto. The decision is of critical importance because the *Eagle-Picher* court, after detailed analysis, declined to follow the decision rendered in the case at bar. Instead, it held that diseases caused by long-term exposure to asbestos "occur" within the meaning of such insurance policies when they become diagnosable. This is the "manifestation theory" of interpretation advanced by the petitioners in these actions.[1]

The *Eagle-Picher* decision bears out several of the arguments which petitioners have made in the instant case:

1. First, the court said that "injury" and "disease" are terms which must be understood in keeping with their ordinary, everyday meaning, rather than given "a hyper-technical definition." Opinion at 13, App. at 15a. Because the exposure theory rests upon medical testimony based on "the cutting edge of one area of the developing science in this field," *id.* at 11, n. 6, App. at 14a, it is not a persuasive reflection of what those words were intended to mean in a business agreement.
2. Second, even if one looks to the "hyper-technical" medical evidence,

> [E]xposure to asbestos does not produce instantaneous sub-clinical cellular changes; some amount of time

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[1] The case at bar and *Eagle-Picher* are diversity actions. In the instant case the Sixth Circuit was governed by (but refused to follow) Illinois and New Jersey law. In *Eagle-Picher* the court observed that three jurisdictions were potentially involved, Ohio, England, *and Illinois*, but that was not of great import since the law of all three jurisdictions was the same, and required a manifestation holding. Slip Opinion at 11 n. 5, App. 13a. Thus, two federal courts have recently applied Illinois law to exactly the same question, with diametric results.

Still another anomaly arises from Liberty Mutual Insurance Company's (Liberty) being a party to both *Forty-Eight* and *Eagle-Picher*. The same form policy language was interpreted in both cases. How is Liberty now supposed to interpret other policies controlled by Illinois law?

> necessarily passes before any destructive process begins. Also, there is no inevitability to the process—it may simply stop at any point along the way without every producing clinically evident disease. This being so, to characterize as injury the minimal changes which occur in some people some time after exposure is not a supportable use of the word "injury" in the context of a liability insurance policy.

Opinion at 10-11, App. at 13a.

3. Third, it noted that the *Forty-Eight* court's refusal to follow the numerous precedents supporting the manifestation interpretation "appears to rest primarily on considerations of policy and result," rather than a legal analysis of the principles established by those precedents. Opinion at 14, n. 9, App. at 17a. The *Eagle-Picher* court did not agree that these ends justified the abandonment of established state authority by a federal diversity court.

Since the two cases at bar are the first appellate decisions dealing with liability insurance coverage for asbestos-related product liability litigation, there is not yet a conflict in the circuits as to the questions presented in these cases. The time for appealing the *Eagle-Picher* decision has not yet expired, and it is not yet known whether that decision will be appealed to the First Circuit.[2] If it is, however, and if it is affirmed, a clear split in the circuits will exist. Even if it is not, moreover, the enormous financial importance of the issue, its widespread effect on the administration of justice in the federal courts, and the number of companies and claimants whose rights are directly affected by the questions at issue, give added importance to the difference of opinion which this question has occasioned in the lower federal courts. *Cf.*, *United States* v. *Constantin*, 296 U.S. 287, 290 (1935):

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[2] In light of the enormous amounts of money at issue, to say nothing of the underwriting and reserving practices of the American insurance industry and the London insurance market, it would be surprising if the decision were not appealed.

> In its petition for certiorari the United States, though admitting the absence of a conflicting decision by the Circuit Court of Appeals of any other circuit, called attention to diverse decisions in the district courts, to the many other cases pending in which action is awaiting authoritative settlement of the question presented herein, to the large amount of money involved, and to the number of persons whose liability will remain uncertain until the dispute is finally settled. The question thus assumes the importance required by Rule 38 and the writ issued accordingly.

A similar result was reached in *Curtis* v. *Loether*, 415 U.S. 189, 191 n. 2 (1974), where certiorari was granted to consider a Seventh Circuit decision on an important question of first impression as to which "the reported decisions of the district courts are evenly divided. . . ." [3]

## CONCLUSION

The *Eagle-Picher* decision both reveals the correctness of the positions taken on the merits by petitioners, and throws into sharp focus the difference of opinion to which the questions in these cases have given rise in the lower federal courts. It accordingly provides yet further evidence of why this Court should resolve these thorny and enormously important problems.

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[3] The same coverage question as these cases present was also argued before the D.C. Circuit on June 16, 1981, in *Keene Corporation* v. *Insurance Company of North America, et al.*, Nos. 81-1180 and consolidated cases (D.C. Cir., filed February, 1981). The appeals in *Keene* were briefed and argued on an expedited basis, and hopefully a decision by that circuit is also imminent. Thus it, too, could give rise to a split in the circuits.

Respectfully submitted,

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*Appendix*

IN THE

## UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

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**Civil Action 78-2739-Z**

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EAGLE-PICHER INDUSTRIES, INC.

vs.

LIBERTY MUTUAL INSURANCE COMPANY
AMERICAN MOTORISTS INSURANCE COMPANY,
WALBROOK INSURANCE COMPANY, LTD.,
WINTERTHUR SWISS INSURANCE COMPANY,
SOUTHERN AMERICAN INSURANCE COMPANY,
MUTUAL REINSURANCE COMPANY, LTD.,
ST. KATHERINE INSURANCE COMPANY, LTD.,
LONDON & EDINBURGH GENERAL INSURANCE COMPANY, LTD.,
BERMUDA FIRE & MARINE INSURANCE COMPANY, LTD.,
DOMINION INSURANCE COMPANY, LTD.,
YASUDA FIRE AND MARINE INSURANCE COMPANY (U.K.), LTD.,
BELLEFONTE INSURANCE COMPANY,
TUREGUM INSURANCE COMPANY, LTD.,
MENTOR INSURANCE COMPANY, (U.K.), LTD.,
ASSICURAZIONI GENERALI LONDON,
STRONGHOLD INSURANCE COMPANY, LTD.,
EXCESS INSURANCE COMPANY,
LONDON & EDINBURGH INSURANCE COMPANY,
NATIONAL CASUALTY COMPANY OF AMERICA, LTD.,
ACCIDENT & CASUALTY INSURANCE COMPANY,
ARGONAUT NORTHWEST INSURANCE COMPANY,
SLATER, WALKER INSURANCE COMPANY, LTD.,
JOHN BASIL THOMAS BIRD, a representative underwriter, and
PHILIP ALAN FROUDE, a representative underwriter.

## JUDGMENT

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Zobel, D. J.

In accordance with the Memorandum of Decision dated August 14, 1981,

It is declared that the operative date for determining which of the several policies in suit apply to a given claim or lawsuit in which damages are sought from plaintiff, Eagle-Picher Industries, Inc. is the date of actual diagnosis of the asbestos-related disease or, with respect to those cases in which no diagnosis was made prior to death, the date of death.

/s/ Rya W. Zobel
Date: August 14, 1981 *District Judge*

## MEMORANDUM OF DECISION

Zobel, D. J.

This is a declaratory judgment action in which Eagle-Picher Industries, Inc. ("Eagle-Picher") requests a declaration of the rights, liabilities and obligations of the parties to certain insurance contracts. The defendants are insurance companies which had provided Eagle-Picher with primary comprehensive general liability insurance and with first and second layer excess insurance during the years 1968-1979. The questions of interpretation arise because Eagle-Picher has been named as a defendant in approximately 5,500 lawsuits in which the plaintiffs allege that they contracted certain asbestos-related diseases as a result of contact with asbestos-containing products manufactured by Eagle-Picher between 1931 and 1971. The basic question the Court must determine is whether insurance coverage is triggered as of the time or times the claimant was exposed to the asbestos-containing product ("Exposure Theory"), or whether such coverage is triggered when the asbestos-related disease first manifests itself by discoverable and diagnosable signs or symptoms, typically as much as twenty years after the initial exposure ("Manifestation Theory"). Whichever insurance company was "on the risk" at what is determined to be the triggering time or times must provide coverage, including payment of damages and provision of legal defense. The Court's interpretation of the policies will determine which insurance company or companies, if any, must defend against and pay any damages for the increasingly numerous underlying claims against Eagle-Picher. Plaintiff, Liberty Mutual Insurance Company and certain companies and underwriters in the London Market, known in these proceedings as the Bird Defendants[1], espouse the manifestation theory. American Motorists Insurance Company ("American Motorists") and certain other named members of the London Market, the so-called Froude Defendants [2], maintain that only policies in effect at the time of exposure provide coverage.

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[1] Walbrook Insurance Company, Ltd., Winterthur Swiss Insurance Company, Southern American Insurance Company, Mutual Reinsurance Company, Ltd., St. Katherine Insurance Company, Ltd., London & Edinburgh General Insurance Company, Ltd., Bermuda Fire and Marine Insurance Company (U.K.), Ltd., Dominion Insurance Company, Ltd., Yasuda Fire and Marine Insurance Company (U.K.), Ltd., Bellefonte Insurance Company, Mentor Insurance Company, (U.K.), Ltd., Assicurazioni Generali London, Stronghold Insurance Company, Ltd., London & Edinburgh Insurance Company, National Casualty Company of America, Ltd., Accident & Casualty Insurance Company, Argonaut Northwest Insurance Company, Slater, Walker Insurance Company, Ltd. and John Basil Thomas Bird, a representative underwriter.

This opinion constitutes both Findings of Fact and Conclusions of Law.

Prior to 1968 Eagle-Picher was uninsured for the underlying asbestosis and related claims. From January 1968 through 1978 Liberty Mutual provided primary insurance with varying limits. From 1973 to 1979 plaintiff was covered in addition by, first one and later two layers of excess insurance.

The coverage provided by each excess layer goes into effect only if the policy limits of the layer beneath become exhausted. This three-layer coverage was achieved through the issuance of many short-term policies, by each insurer, typically covering one year at a time. Appendix A provides a graphic representation of the coverages in effect during the relevant period.

In 1977 Liberty Mutual sent to Eagle-Picher a warning notice that the policy limits for 1974 and 1975 might be exhausted. Eagle-Picher forwarded this notice to American Motorists and the London Market. American Motorists acknowledged receipt of the notice but indicated disagreement with Liberty Mutual's assignment of claims to policy periods and its handling of claims under the manifestation theory. By letter dated October 13, 1977 a New York law firm acting for the entire London Market sent a reservation of rights letter to Eagle-Picher concerning the underlying claims. The reservation of rights is based on the issue whether liability is to be determined under the manifestation or exposure theory. A genuine controversy exists between the parties with regard to the defendants' duties and obligations under their respective policies in connection with the underlying asbestos related claims.

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[2] Turegum Insurance Company, Ltd., Excess Insurance Company, and Philip Alan Froude, a representative underwriter.

All defendants with interests adverse to those of Eagle-Picher are citizens of states or countries other than Ohio, the state of incorporation of Eagle-Picher and the state where its principal place of business is located.

The insurance policies at issue all contain "coverage" clauses defining in general terms the scope of the coverage. In addition, the policies provide definitions of relevant terms. All are "occurrence-based", that is, coverage is provided for personal injury caused by an "occurrence" during the policy period. The policies, while quite similar, contain minor variations in language and punctuation which do not, however, affect the determination of the question presented so as to produce different results for different insurers. Before analyzing the policies, it is useful to lay out the relevant language.

1. Between January 1, 1968 and January 1, 1978, Liberty Mutual provided the plaintiff with primary comprehensive general liability insurance. The fourteen separate policies contain no more than two variations of each relevant clause. With respect to coverage, one variation, found primarily in policies written during the early years, provides:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury . . . to which this policy applies, caused by an occurrence . . .

The second variation, found in policies covering January 1, 1976 to January 1, 1978, provides:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury due to asbestos exposure caused by an occurrence if the bodily injury is included within the products hazard . . .

The policies include two slightly different definitions of relevant terms. The first provides:

> *Bodily injury* means bodily injury, sickness or disease sustained by any person.
>
> *Occurrence* means an accident, including continuous and repeated exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

The second provides:

> *Bodily injury* means bodily injury, sickness or disease sustained by any person, which occurs during the policy period, including death at any time resulting therefrom.
>
> *Occurrence* means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected or intended from the standpoint of the insured.

2. From June 1, 1973 to October 1975 American Motorists provided the plaintiff with a first layer excess umbrella policy, containing the following coverage clause:

> The Company agrees to indemnify the insured for all sums which the insured shall become obligated to pay as damages, by reason of liability . . . because of personal injury . . . caused by or arising out of an occurrence which takes place during the policy period anywhere in the world.

The policy also contains the following definitions:

> *Personal injury* means (a) bodily injury, shock, sickness or disease (including death, mental anguish, and mental injury resulting therefrom); . . .

> *Occurrence* means an accident, or a continuous or repeated exposure to conditions which results, during the policy period, in personal injury, . . . property damage or advertising liability neither expected nor intended from the standpoint of the insured. . . .

3. From October 10, 1975 through January 1, 1979 the so-called London Market provided plaintiff with first layer excess umbrella insurance, replacing American Motorist. The "London Market" is a group of insurance underwriters, each of whom underwrites a stated percentage of the total coverage provided by a single policy. The "coverage clause" of the London Market policy provides:

> Underwriters hereby agree . . . to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability . . . imposed upon the Assured by law . . . for damages on account of: Personal Injuries . . . caused by or arising out of each occurrence happening anywhere in the world. . . .

The policy also contains the following definitions:

> The term *personal injuries* wherever used herein means bodily injury (including death at any time resulting therefrom,) mental injury, mental anguish, shock, sickness, disease, disability. . . .

> The term *occurrence* wherever used herein shall mean an accident or happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, prop-

> erty damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises shall be deemed one occurrence.

4. The London Market also provided plaintiff with second layer excess umbrella coverage from September 1, 1973 to January 1, 1979. These second layer policies contain no independent coverage clauses or definitions; instead, they incorporate by reference the terms of the underlying policy. Each policy contains a clause providing for payment of damages "caused by or arising out of each occurrence . . . arising out of the hazards covered by and defined in the underlying umbrella policies. . . ." Thus, between September 1, 1973 and October 10, 1975, the London Market second layer policies provided coverage in accordance with the terms of the underlying American Motorists first layer policy; from October 10, 1975 to January 1, 1979 the London Market second layer policies provided coverage as defined by the London Market's own first layer policies.

All parties to this dispute agree that the relevant policy language is clear and unambiguous. They disagree as to the meaning of the unambiguous language and the Court received certain medical evidence in aid of interpretation.

The coverage clauses, except that in the American Motorists policies, provide indemnity for all sums for which the insured shall become legally obligated to pay [liability imposed by law] for "damages because [by reason or on account] of . . . bodily [personal] injury . . . caused by [or arising out of] an occurrence . . ." American Motorists' differ in that they agree to indemnify with respect to "an occurrence during the policy period."

The terms used in the policy are terms of art. Both "personal" or "bodily injury" and "occurrence" are defined in each policy. Each term of art is linked to the next by the use of casual connectors such as "by reason of" "because of" and "caused by or arising out of." Liability is "caused" by injury, and injury in turn is "caused" by an occurrence. This construction implies that liability, injury, and occurrence, while necessarily connected, are nevertheless distinguishable. It means further that each element is expected to occur separately in time.

All policies except the later group of those written by Liberty Mutual define occurrence as "an accident or a continuous or repeated exposure to conditions which results, during the policy period, in personal injury . . ." This definition is broad and inclusive. Each "occurrence" is made up of two components, initial exposure or accident and resulting injury; neither one without the other would be sufficient. There can be no question but that the aspect of the occurrence which must take place within the policy period, however, is the "result", that is, the time when the accident or injurious exposure procedures personal injury. The time-limiting phrase "during the policy period" always follows the word "results" and frequently is set off by commas, so that it can modify only the preceding verb "results". Thus, the definitional language explicitly focuses on the result rather than the cause as the component to which coverage is linked. This is equally true of the American Motorists policies. Even though their coverage clauses refer to "occurrence during the policy period," their definition of occurrence also links the resulting injury, not the exposure to conditions, to the policy period.[3]

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[3] Recently, in *Am. Motorists Ins. v. E. R. Squibb & Sons*, 95 Misc. 2d 222, 406 N.Y.S. 2d 658 (1978) the Supreme Court for New York County adopted the manifestation rule in construing, with respect to claims for cervical cancer caused by the drug DES, an American Motorists policy

The next question to be determined is what the policies mean by "personal" or "bodily injury" given the diseases which gave rise to the underlying claims. The exposure proponents maintain that "personal injury," within the meaning of these policies, occurs when the first sub-clinical cellular changes take place within the lung. They argue that asbestosis is not a disease at all, but a lengthy injurious process which begins with a series of minute but definite "insults" to the lungs. These insults comprise a succession of separate, compensable personal injuries, each of which, they say, meets the policy's requirement of resulting injury.

The manifestation proponents, on the other hand, contend that with respect to asbestosis, mesothelioma and broncogenic carcinoma, the policy term "personal injury" refers neither to a lengthy process, nor to a series of microscopic "insults", but to clinically evident, diagnosable disease. In the case of asbestosis, they argue, the "result" does not occur until the accumulated depositioning of asbestos fibers in the lung, with its attendant secretion of destructive enzymes, produces such significant interference with lung function that the victim suffers perceptible, measurable symptoms.

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which provided coverage for an "accident or injurious exposure to conditions which results, during the policy period, in bodily injury. . . ." In Squibb, the exposure to the drug occurred in 1952, 1953 and 1961, while the disease only became manifest in 1970, 1971 and 1975, in the daughters of mothers who had ingested the drug. The court found that "the policy language does not limit coverage to incidents of exposure during the policy period, but rather to conditions which result in bodily injury during the policy period. A reading of the policy language would appear to indicate that coverage is predicted not on the act which might give rise to ultimate liability, but on the result. It would be a strained interpretation to construe the occurrence clause as though it covered "exposure during the policy period which results in bodily injury." It is the result which is keyed to the policy period, and not the accident or exposure." *Id.* at 659-660.

The exposure proponents bolster their arguments with sophisticated medical analyses of the fibrosing process from the time of exposure to the time of disability or death; in fact, an appreciation of these medical details is necessary in order to understand the exposure proponents' concept of minute "insults" to the lung. The manifestation proponents, in contrast, argue that the policy terms must be analyzed from a layman's point of view. When this approach is taken, they say, no medical evidence is necessary; instead, the Court need only look to the common and everyday meaning of terms such as "disease" and "injury", in order to conclude that exposure results in injury when it manifests itself through clinically evident diesase.

Because these questions were unresolved at the time of trial, and to aid in interpretation of the relevant language the Court received expert medical testimony from Dr. Bernard Gee, a research scientist and clinician with vast experience in the area of asbestos-related disease, and from Dr. Edward Burger, a researcher and administrator whose testimony was based on a review of current literature in the field and not particularly helpful. With minor exceptions, however, the testimony of the experts was not inconsistent. After careful consideration of that medical evidence, the insurance policy language, and the common meaning of the terms employed therein, I find that exposure to asbestos does not "result" in "personal injury" so as to trigger insurance coverage until such time as the accumulation of asbestos fibers in the lungs produce signs and symptoms capable of diagnosis as an asbestos-related "disease," in the commonly understood meaning of the term "disease." This finding is based on several considerations.

First, the testimony of both experts contradicted the central contention of the exposure theory that exposure and injury occur either simultaneously, or so nearly so that coverage for injury can most reasonably be linked to the time of the exposure. The testimony of the exposure proponents' own expert, Dr. Gee, made it clear not only that exposure to asbestos typically does not produce clinically evident disease for as much as twenty years, but also that the sub-clinical injuries to the lung produced early in the destructive process do not occur simultaneously with the exposure. Before even subclinical injury can occur, the asbestos fiber must pass a number of dichotomously branching tubes in the nose and throat which get progressively narrower, must reach the lung and become depositioned there, and must be enveloped by a scavenger cell, an alveolar macrophage which may then begin to produce destructive enzymes in a futile attempt to destroy the the indestructible asbestos fiber. Because the fiber is not biodegradable, the macrophage continues to secrete enzymes which eventually destroy surrounding tissue and produce scarring. These tiny lung scars are the "insults" to which the exposure proponents refer. Along the way, nearly all fibers are removed, either through expectoration, by means of the physiological filters in the nose and throat, through being carried back up and out by the mucociliary escalator, or sometimes by being taken away by an alveolor macrophage through the lymphatic system or the mucociliary escalator.[4] Moreover, even when the fiber has become embedded in the lung and the scarring process has begun, the end result, that is, disabling disease or death, is by no means inevitable. In fact, Dr. Gee testified that over 90% of all urban city dwellers have some asbestos-related scarring, but only a tiny percentage of those exposed will ever de-

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[4] It is possible that such removal by a macrophage may, however, occur after insult to the alveolar region of the lung from secretion of enzymes by the same macrophage.

*velop clinical asbestosis. In short, exposure to asbestos does* not produce instantaneous sub-clinical cellular changes; some amount of time necessarily passes before any destructive process begins. Also, there is no inevitability to the process—it may simply stop at any point along the way without ever producing clinically evident disease. This being so, to characterize as injury the minimal changes which occur in some people some time after exposure is not a supportable use of the word "injury" in the context of a liability insurance policy.

To say that exposure to asbestos results immediately in personal injury, is unreasonable for another reason. It is a basic tenet of insurance law that unambiguous contract terms are to be given their common, popular and ordinary meaning, 13 J. Appleman Insurance Law and Practice § 7384 (rev. ed. 1976), 43 Am. Jur. 2d Insurance, § 256.[5] Unless the insurance contract explicitly draws upon a technical or scientific meaning of a term, shared by both parties, the Court is to apply the meaning which a non-specialist would understand. *Lincoln Nat. Life Ins. Co.* v. *Erickson*, 42 F.2d 997, 1001 (8th Cir. 1930), *Reiser* v. *Metropolitan Life Ins. Co.*, 28 N.Y.S. 2d 283, 262 App. Div. 171 (1941) *aff'd.* 289 N.Y. 561 43 N.E.2d 534 (1942). In this case, while Eagle-Picher, a large manufacturer, might be expected to have technical knowledge relating to its products and enterprises, it cannot be assumed to have had sophisticated medical knowledge of the biochemical details of the asbestosis process,[6] to have intended that any abstruse or unusual meanings be given to the terms in its product liability insurance policies. Where there is a conflict between a technical or medical definition and the meaning an average person would apply to an insurance term, the court will accept and apply the layman's viewpoint. *Irelan* v. *Standard Mutual Assoc.*, Mo. App. 379 S.W.2d 815 (1964). As a result, the Court must interpret the policy from the point of view of the layman.

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[5] The parties raised before trial the question whether the law of Ohio, of Illinois, or of England should control the interpretation of the insurance contracts at issue here. I find that there is no true conflict among all potentially applicable laws, and therefore I do not reach the question of which state law would be applied to these contracts. *Forsyth* v. *Cessna Aircraft Co.*, 520 F.2d 608, 612 (9th Cir. 1975).

The policies define personal injury or bodily injury in lay terms, "bodily injury, shock, sickness or disease (including death, mental anguish and mental injury resulting therefrom.)" The exposure proponents assert that asbestosis is a process, not a disease, and that coverage should be provided for a series of minute personal or bodily insults to the lung. The manifestation proponents point out that all of the underlying claims against Eagle-Picher allege fully manifested asbestos-related diseases, not sub-clinical cellular injuries, and they argue that to a layperson, asbestosis or asbestosis-related injury means symptomatic diagnosable disease, regardless of what the terms might mean to a research scientist.

Dr. Gee, who is also a clinician with vast treatment experience, proferred his own definition of "asbestosis" as an injury mechanism which is present soon after the first asbestos fiber is embedded in the lung, but went on to distinguish between his specialized meaning of the word in the context of research and the meaning he would give the word as a treating physician. According to Dr. Gee, "when a patient asks 'Do I have asbestosis?' He means: Do I have clinically evident disease by your methods, including my own perceptions, that is, the patient's, . . . . He doesn't mean: Do I have some injury mechanism going on." Dr. Gee drew the same distinction again when he said, with reference to a patient's history of exposure to asbestos, and the presence of asbestos in his lung, "If I find asbestos, I cannot conclude without other evidence that there is clinical disease. I can conclude that there is an injury mechanism set in motion." That testimony, combined with the ordinary meaning of the coverage language, leads to the conclusion that exposure to asbestos results in "personal injury" when it produces clinically evident diagnosable disease, that is, when it becomes manifest. Although the injurious process begins many years prior to the eventual manifestation of clinical asbestosis, the phrase "results in personal injury" cannot, absent the application of a hyper-technical definition of the words, refer to the earliest subclinical cellular damages, but must refer to the time when the individual has clinically evident disease.

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[6] Dr. Gee agreed that his work is on the cutting edge of one area of the developing science in this field, that indeed, only within the last five to eight years has attention in the field focussed on biochemical cellular changes rather than microscopy and morphology. His testimony is in large part based on that new focus.

The scope of the Court's analysis so far has been limited to an examination of the text of the policies and to a review of the relevant medical testimony. However, because other courts have come to different conclusions and because the rules of construction governing the interpretation of insurance contracts explicitly serve certain public policy goals, it is appropriate to assess the manifestation theory in a broader context.

The Sixth Circuit, in a recent decision, affirmed the District Court's adoption of the exposure theory.[7] It nevertheless concluded that it was "bound to broadly construe the insurance policies to promote coverage." *Ins. Co. America* v. *Forty-Eight Insulations*, 633 F.2d 1212, 1219 (6th Cir. 1980)—(hereafter "Forty-Eight"). The underlying facts of the *Forty-Eight* case are, from a public policy point of view, substantially different from those at issue here. In that case, Forty-Eight had purchased liability insurance as far back as 1955, but its coverage starting in 1976 contained such a large per person deductible for asbestos cases that the court found that "as a practical matter, Forty-Eight is uninsured for asbestosis occurring after 1976." *Forty-Eight, supra*, at 1216 n.6. This consideration led the Court to reject as not controlling precedents in the area of health insurance which it found to be "most relevan[t]." [8] Although the Court acknowledged that these cases appeared to support the manifestation theory, it nevertheless held that they in fact supported the exposure theory because "the health insurance cases rely on the same rules of construction that we think are applicable here: insuance policies must be strictly construed in favor of the injured and to promote coverage;

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[7] The *Forty-Eight* opinion was recently adopted both as to "reasoning and result" by the Fifth Circuit, in *Porter* v. *American Optical Corp.*, 641 F.2d 1128, 1145 (5th Cir. 1981). See also, *Keene Corporation* v. *Ins. Co. of No. Amer.*, No. 78-1011 (D.C. D.C. January 30, 1981).

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[8] The cases cited by the Sixth Circuit are part of a line of cases which, interpreting clauses in insurance policies which exclude from coverage any sickness or diseases originating and commencing prior to the issuance of the policy, nevertheless find in favor of coverage where the disease becomes manifest during the policy period, although the medical cause clearly existed prior to manifestation. See, e.g. *Royal Family Ins. Co.* v. *Grimes*, 42 Ala. App. 481, 168 So. 2d 262 (1964); *Reiser* v. *Metropolitan Life Ins. Co.*, 262 App. Div. 171, 28 N.Y.S. 2d 283 (1941) *aff'd*. 289 N.Y. 561, 43 N.E.2d 534 (1942) (Presence of calcium deposits which might never have become a source of physical disturbance not a disease until manifest. The meaning of the agreement must not be that of the scientist but that of the average person.); *Metropolitan Life Ins.* v. *Reynolds*, 48 Ariz. 205, 60 P.2d 1070 (1936) ("Defendant is liable, though the medical cause of the disease existed prior to the policy, if the disease or sickness does not manifest itself until afterwards. So ordinary men wanting health protection would understand it." 60 P.2d at 1073); *Fuller* v. *Aetna Life Ins. Co.*, 259 F.2d 402 (5th Cir. 1958); 10 Couch on Insurance 2d § 41.814 at 639.

similarly a policy must be construed to favor the legitimate expectations of the parties." *Forty-Eight, supra*, at 1221. The Court went on to conclude:

> In this case, we are faced with two possible constructions, one of which is likely to leave the manufacturer insured, the other of which leaves the manufacturer uninsured for all practical purposes. We think that Illinois and New Jersey courts [the states whose law was arguably applicable to the insurance contracts] would try to construe the contract language to embrace the exposure theory. *Forty-Eight, supra*, at 1222.[9]

In the present case, the Court is similarly faced with one construction which would provide coverage, and another which leaves Eagle-Picher uninsured. Here however, it is the manifestation theory which is like to maximize the coverage provided to Eagle-Picher in the underlying lawsuits. As the earlier discussion demonstrates, this court's adoption of the manifestation theory is grounded on a finding that the relevant text of the insurance policies, as explained by the medical evidence dictates manifestation. An additional strand of support for this conclusion, however, is provided by the fact that application of general rules of insurance policy construction, with their public policy underpinnings, produces the same result.

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[9] The *Forty-Eight* decision appears' to rest primarily on considerations of policy and result. However, insofar as it is based on review and interpretation of the medical evidence relating to asbestosis, it rests on findings with which I am not in agreement. The Sixth Circuit accepted the notion that every "insult" to tissue in the lungs constitutes "bodily injury" within the meaning of the applicable insurance policies. My review of the medical evidence persuades me that these subclinical changes, only recently identified by the most sophisticated medical research techniques, constitute neither "bodily injury" nor "disease" within the common and ordinary meaning of these terms.

The facts of this case also indicate that manifestation most closely approximates the expectations of the contracting parties. As noted above, Eagle-Picher was uninsured during most of the thirty years up to 1971 during which it manufactured asbestos. Only in 1968 did Eagle-Picher first purchase general liability coverage. During the years after 1971, when Eagle-Picher ceased to produce asbestos-containing materials, it nevertheless continued to purchase, and in increasing amounts, insurance coverage for damages due to injury caused by asbestos exposure [See App. A]. Although there was scant possiblity that claims based on further exposure to asbestos would be made, it could certainly be predicted that increasingly numerous manifestations of asbestos-related diseases would occur, giving rise to increasingly numerous claims against Eagle-Picher. The fact that Eagle-Picher bought substantial amounts of insurance explicitly keyed to damages due to asbestos exposure during a period when no such exposures were taking place lends yet further support to the conclusion that the expectation of the contracting parties was that coverage would be provided on a manifestation, rather than an exposure, basis.

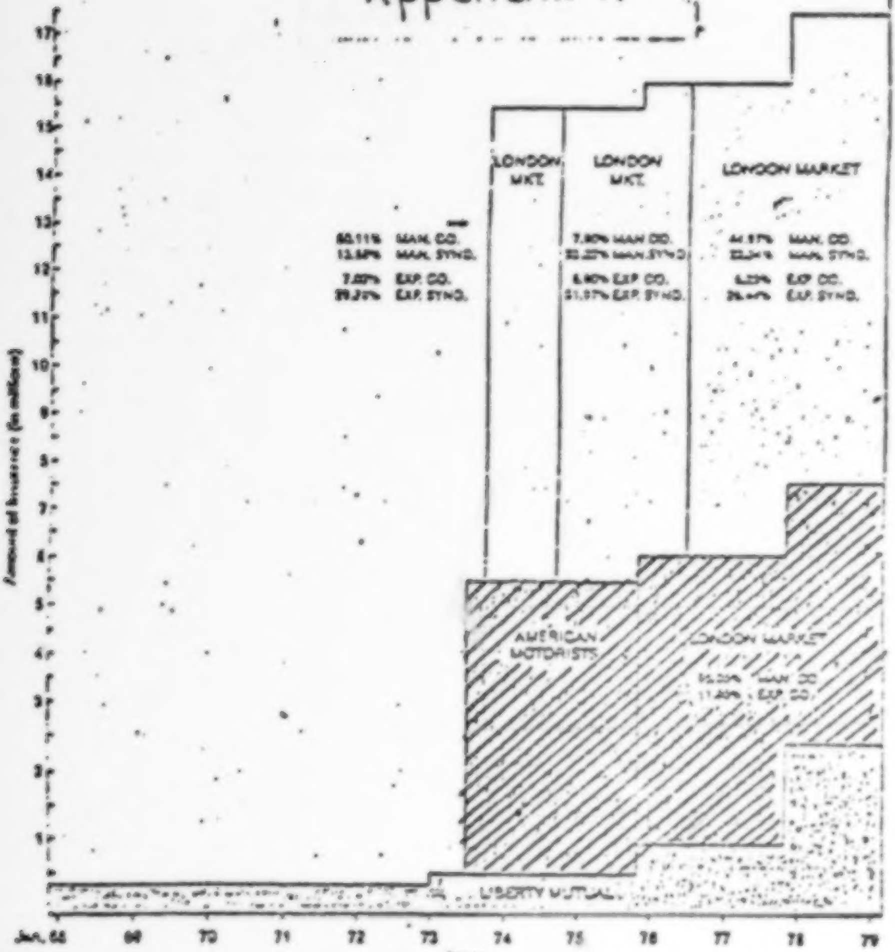
Having found in favor of manifestation, a workable definition of the term "manifestation" remains to be delineated. The parties have proferred several possibilities. These include the date on which an asbestosis victim "knows or has reason to know" he has the disease, the date on which a victim's symptoms become "capable of medical diagnosis," the date of actual diagnosis, or the date of death. Because of the thousands of underlying lawsuits against plaintiff, each seeking damages for asbestos-related disease, the policies in issue must be interpreted not only to reflect the manifestation concept, but also to ensure that coverage is certain, and the availability of coverage is easily ascertained and easily demonstrated. I conclude that with respect to all claims under the insurance policies at issue in this case, coverage shall be provided when the asbestos-related disease becomes manifest, as measured by the date of actual diagnosis or, with respect to those cases in which no diagnosis was made prior to death, the date of death. This holding does not require pro rata sharing or apportionment of damages on account of Eagle-Picher's liability for asbestos-related claims.

Judgment shall enter in accordance with this opinion.

/s/ RYA W. ZOBEL
DATE: August 14, 1981 *District Judge*

AMOUNT OF INSURANCE
INSURERS

# Appendix A



☐ - second layer excess
▨ - first layer excess
░ - primary

# Opposition

Office - Supreme Court, U.S.
FILED
NOV 17 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 81-198 and 81-199

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1981

INSURANCE COMPANY OF NORTH AMERICA,
*Petitioner,*
vs.
FORTY-EIGHT INSULATIONS, INC., et. al.,
*Respondents.*

LIBERTY MUTUAL INSURANCE COMPANY,
*Petitioner,*
vs.
FORTY-EIGHT INSULATIONS, INC., et. al.,
*Respondents.*

**On Petitions for Writs of Certiorari
to the United States Court of Appeals
for the Sixth Circuit**

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## RESPONDENT'S BRIEF IN OPPOSITION

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of Rhode Island*

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## I

## QUESTIONS PRESENTED FOR REVIEW

1. The Court of Appeals for the Sixth Circuit, exercising diversity jurisdiction in an action involving the interpretation of liabilty insurance contracts issued to a manufacturer of asbestos products, lessened the insured's burden of proving facts establishing coverage for asbestos-related bodily injury claims against it by placing on its insurers the burden of showing that the asbestos to which a claimant had been exposed had not been manufactured by the insured. Assuming that that decision was incorrect as a matter of Illinois and New Jersey law, is the *Erie* issue thus raised adequately presented and sufficiently substantial to warrant this Court's plenary review?

2. In deciding an unprecedented question of liability insurance contract interpretation, the Court of Appeals for the Sixth Circuit, exercising diversity jurisdiction, found that Illinois and New Jersey law required apportionment of insurance coverage for asbestos-related bodily injury claims on the "exposure theory" of coverage, that is, it found that those policies in effect during periods of a claimant's exposure to asbestos provided coverage, not those in effect when the disease consequences of exposure became manifest. Is that decision of state law clearly erroneous?

## II

## LIST OF PARTIES

Petitioner Insurance Company of North America (hereinafter "INA") was the sole plaintiff in the District Court and an appellant in the Court of Appeals. The defendants in the District Court were Forty-Eight Insulations, Inc., Affiliated FM Insurance Company (hereinafter "Affiliated"), Illinois National Insurance Company (hereinafter "Illinois National"), The Travelers Indemnity Company of Rhode Island (hereinafter "Travelers"), and Liberty Mutual Insurance Company (hereinafter "Liberty"). Travelers was an appellee in the Court of Appeal; Forty-Eight Insulations, Inc. was an appellee and cross-appellant in that court; INA, Liberty, Affiliated and Illinois National were appellants.

A list of corporations affiliated with Travelers is attached as Appendix A, page A 1.

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Nos. 81-198 and 81-199

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1981

INSURANCE COMPANY OF NORTH AMERICA,
*Petitioner,*
vs.
FORTY-EIGHT INSULATIONS, INC., et. al.,
*Respondents.*

LIBERTY MUTUAL INSURANCE COMPANY,
*Petitioner,*
vs.
FORTY-EIGHT INSULATIONS, INC., et. al.,
*Respondents.*

**On Petitions for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

## JURISDICTION

The judgment of the Sixth Circuit was entered on October 21, 1980, with one judge of the panel dissenting. On March 5, 1981, petitions for rehearing were granted in part and otherwise denied. On May 22, 1981, Justice Stewart granted an extension of time until August 2, 1981, to file petitions for certiorari, which were timely filed by petitioner INA and by petitioner Liberty. On October 13, 1981, the Clerk of this Court requested those parties that had not filed a response to do so by November 9, 1981. On October 16, 1981, Travelers requested an extension of time within which to file a response, and on October 20, 1981, the Clerk granted an extension of time for all respondents to file responses to and including November 16, 1981.

Jurisdiction to review the judgment is invoked pursuant to 28 U.S.C. § 1254(1).

## PRELIMINARY STATEMENT

The case below presented difficult and unprecedented questions of liability insurance contract interpretation. All parties agree that these questions, like most issues of insurance policy construction, were and are to be decided solely by reference to state law. Thus, the only basis urged by petitioners for this Court's plenary review of the decision below is the claimed failure of the Court of Appeals, exercising diversity jurisdiction, to properly find and apply the relevant state law. Specifically, they argue in substance, that the Sixth Circuit erred in two respects: (1) it purportedly failed to make the proper construction of the actual language of the respective insurance policies, the so-called theory of coverage, and (2) it purportedly failed to make the proper allocation, as between insurer and insured, of the burden of proving when exposures to the insured's asbestos products occurred, a prerequisite to coverage under the policies. Respondent respectfully submits that neither question merits this Court's plenary review.

The decision of the Court of Appeals of the first question, the fundamental coverage issue, and a basic matter of insurance contract interpretation, simply does not raise any substantial federal question. Petitioners admit that there are no controlling Illinois or New Jersey precedents or statutes which govern the interpretation of the insurance contracts here in issue. Nevertheless, they would have this

Court review and reverse the Sixth Circuit's well-reasoned assessment of the decisions that courts of Illinois and New Jersey would make if confronted with the same issues. This Court should not substitute its prediction for the decision of the Court of Appeals on a question of state law that is still undecided and in a state of flux.

The second question, petitioners' challenge to the Sixth Circuit's ruling on the burden of proof, facially has more merit. A federal court, exercising diversity jurisdiction, must apply the substantive rules of the relevant state law, including rules relating to presumptions and burdens of proof. *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446 (1959). The Sixth Circuit recognized that the law of both Illinois and New Jersey places upon the insured the burden of proving facts that establish coverage. However, because of the unique circumstances of asbestos-related bodily injury claims and the new basis of products liability being enunciated by the courts, the Sixth Circuit held that the insurer must bear the burden of rebutting a presumption that the insured's products were involved for each year in which a claimant was exposed to asbestos-containing products.

The Sixth Circuit's invocation of such a rule appears to be contrary to the weight of state law. However, petitioners did not raise that issue or address the ramifications under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) of this burden-shifting, despite the opportunity to do so, in their petitions for rehearing, nor did they raise or address the issue in the District Court. Had they done so, they would have given all parties the opportunity to present additional evidence and argument regarding the factual predicate for the Sixth Circuit's decision regarding the burden of proof.

the purported impossibility of determining when and to which manufacturer's products a particular claimant was exposed.[1] This Court should avoid plenary review under those circumstances.

Moreover, Petitioner INA's complaint that the Sixth Circuit's opinion "reflects only what it deems proper and fair, not what Illinois or New Jersey courts would hold proper and fair" (INA brief, page 11) disregards the medical evidence and factual determinations which underlie the findings and conclusions of both the District Court and the Court of Appeals. When proper regard and deference is given to these determinations and the evidence, it becomes obvious that petitioners' arguments stem more from their disagreement with the results than with the means by which they were reached, including the claimed failure of the Sixth Circuit to follow state law.

That court did, however, consider and follow the applicable principles of state law with respect to the fundamental coverage issue presented to it, including a guiding principle of insurance law, that insurance policies be interpreted to follow the reasonable expectations of the insured. Those expectations, in the context of this case, concern coverage for products liability. The underlying theory of tort liability, the court noted, is that the

> ". . . asbestos manufacturers continually failed to warn the asbestos workers and that, as a result of this, continuous breathing of asbestos particles allowed asbestosis to progress to the point where it caused death or injury. The insurance policies before us are comprehensive general liability policies which are designed to

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[1] In fact, had such evidence been adduced, it is likely that the Sixth Circuit would not have decided to lessen the insured's burden of proof.

> insure the manufacturer against products liability suits. The contracting parties would expect coverage to parallel the theory of liability." *Id.*, 633 F.2d at 1219.

Because the underlying theory of liability is premised upon injurious exposure to asbestos, and does not require a claimant to identify the date(s) of inhalation or ingestion of the asbestos fibers produced by a particular manufacturer, it was both logical and reasonable for the Sixth Circuit to conclude that Illinois and New Jersey courts would rule that products liability coverage should follow the developing law of tort liability, with its attendant consequences on policy interpretation and the burden of proof.[3]

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[3] Though the presumption invoked by the Sixth Circuit is a logical corollary of the underlying theory of liability, it is unnecessary. The vast majority of thousands of cases and claims handled by respondent have presented no extraordinary difficulty in establishing when exposures to a particular manufacturer's asbestos products occurred.

It is also revealing to call the Court's attention to significant policy language which petitioners have either ignored or deemphasized: the fundamental issue in the case is the interpretation of the terms "bodily injury, sickness or disease", in the respective policies, not just the term "disease".

Both petitioners erroneously focus on asbestos-related diseases and when they occur. (Liberty brief, p. 4; INA brief, p. 20.) The policies at issue, however, cover, in the disjunctive, not only disease, but "bodily injury, sickness *or* disease . . . which occurs during the policy period." (Emphasis added.) Since the three terms are stated in the disjunctive, coverage, as was carefully noted by the District Court, is triggered by the occurrence of any one of the three during the policy period, and bodily injury, in the case of inhalation or ingestion of asbestos fibers, does occur, as a matter of fact, long before an asbestos-related disease manifests itself. The District Court, in support of its factual findings, which are not the subject of the petitioners' requested review, noted that the medical evidence and depositions in evidence were "in substantial agreement on all points that are relevant to the issues." *Id.*, 451 F.Supp. at 1236.

## REASONS FOR DENIAL OF THE WRITS AND REFUSAL TO GRANT PLENARY REVIEW

Petitioners recognize that the Sixth Circuit grappled with a "novel and important question of insurance law" which is "one of first impression for an appellate court . . ." Id., 633 F.2d at 1213, 1223. Petitioners further concede that this Court's exercise of its certiorari power would not ordinarily be appropriate where, as here, the decision involved matters of insurance contract interpretation according to state law. *Huddleston v. Dwyer* (1944) 322 U.S. 232, 237. Nor have petitioners cited any controlling state law which would clearly demonstrate that the Sixth Circuit did not discharge its obligations under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Petitioners have failed to demonstrate that this Court's decision on the merits would resolve or simplify the extraordinary problems in the administration of justice presented by the "avalanche" of asbestos-related litigation. The simple truth is that a decision on the merits would not provide a national solution, but would, at most, affect only cases applying Illinois and New Jersey law to the insurance coverage question.[3]

Even if the Sixth Circuit's decision respecting the burden of proving exposures to the insured's asbestos products is contrary to state law, that issue was decided without being raised in the District Court and without the benefit of argument or briefs addressing the proper allocation of the burden of proof and the *Erie* questions presented thereby. The record does not support petitioners' factual assertion that requiring the insured to prove when exposures to its asbestos products occurred would make it impracticable for the insured to prove coverage in most instances. Given this state of the record, the failure to address the issue below, and the failure to raise the question in the petitions for rehearing to the Sixth Circuit, this Court should not in the first instance exercise plenary review.

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[3] Any other conclusion would suggest that the petitioners have invited the Court to declare a national common law, an inappropriate undertaking for the Court.

### A. Petitioners Did Not Raise the Issue of Allocating the Burden of Proof in the District Court nor in the Petitions for the Rehearing in the Sixth Circuit. The Erie Question Raised Thus Is Insufficiently Developed to Merit Plenary Consideration

The distribution of the burden of proof in this contract dispute, like the interpretation of the language of the insurance contracts and determination of the coverage theory, is a question of state law. Hence, the allocation of that burden to petitioners in this case would normally raise no federal question of constitutional magnitude but for the claimed failure to follow state law, in violation of the mandate of *Erie:*

> "Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Lavine v. Milne,* 424 U.S. 577 at 585 (1976).

Petitioners cite no Illinois or New Jersey cases that directly address the issue of the burden of establishing liability insurance coverage for progressive, insidious diseases. Respondent recognizes that the weight of authority—including that in Illinois and New Jersey—requires the insured to prove the facts of a loss to establish coverage under a particular policy. However, it is far from clear that Illinois or New Jersey courts would adhere to the traditional rule if confronted with the unique circumstances of this case.

Where reason and common sense call for shifting the usual burden of proof, due to the special circumstances of the case, state courts can and do reverse the ordinary rules. See, e.g., *Anderson v. Somberg*, 134 NJ Super 1, 338 A.2d 35 (1973), *aff'd* 67 NJ 291, 338 A.2d 1 (1975), *cert. denied* 423 U.S. 929 (defendant manufacturer had burden of disproving causation in products liability/negligence action where 'reason and common sense' indicated liability, and the defendants were more likely to possess knowledge of the cause of the accident). The question of whether the insured should bear the burden of proving when exposures to its asbestos products occurred is not conclusively answered by reference to the applicable state law. Hence, reason and common sense, in accordance with state principles of jurisprudence and in special circumstances where liability is indicated, may call for a change in the allocation of the usual burden of proof.

The Sixth Circuit's decision reflects such reason and common sense because it logically follows the underlying theory of liability. Under *Borel v. Fibreboard Paper Products Corporation*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), an asbestos manufacturer, sued with other manufacturers, is subject to joint and several liability for a claimant's total loss if the claimant proves exposure to the manufacturer's products at any time and the resulting asbestos-related disease. In effect, then, the liability that may be imposed upon any one manufacturer derives from the claimant's entire period of exposure to the asbestos manufactured by all the defendant manufacturers, not just exposure to that manufacturer's products. The Sixth Circuit's decision thus parallels *Borel*, which in many respects also departed from state law, by similarly establishing a presumption that the insured's products were involved for each year of a claimants' exposure.[4]

However, the court did adhere to more settled state law regarding the insured's burden of proof when it required the insured to bear the burden of proving the existence of and coverage afforded by insurance policies issued to it (Forty-Eight Insulations, Inc. was treated as if it were uninsured prior to 1955 because it could not prove the existence of earlier policies purchased by it). The decision, therefore, is not the total departure from state law that petitioners assert.

Petitioners concede that the issue of the burden of proving or disproving facts which establish coverage was not raised or addressed in the District Court. Moreover, the Sixth Circuit did not have the benefit of briefing or argument on the *Erie* question raised by its decision respecting the burden of proving when exposures to the insured's asbestos products took place. (Liberty brief, p. 11, n. 10). Despite petitioners' contentions to the contrary and quite possibly because they did not raise the question in their petitions for rehearing, it cannot readily be determined whether the Sixth Circuit actually disregarded applicable state law or merely applied the rule which it believed would be applied by the state courts if they were presented with the unique circumstances of this case.

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[4] Neither the court nor respondent, of course, suggests that a manufacturer is entitled to liability coverage it did not purchase. As to exposures which occur during uninsured periods, the manufacturer must bear its proportionate share of the liability and costs of defense. As to exposures which occur during insured periods, each insurance company is responsible only for its proportionate share. The narrow issue before the Court is the proper allocation of the burden of proof of facts which establish coverage for any particular policy, and not the extent of coverage (or proof thereof) afforded by the various policies of insurance.

Petitioners contend that the practical difficulties involved in proving when the claimant was exposed to the insured's asbestos products render the allocation of the burden of proof of such facts dispositive. As far as respondent is aware, however, the record does not support this assertion. (Liberty made no reference to any evidence in the record when it argued in its Reply Brief at pps. 26-27, that, because the burden of proof was on the insured, the exposure theory would render insurance coverage "illusory.") Moreover, as indicated above, respondent's experience has been that, in most cases, there are no insurmountable problems in establishing the timing of exposures to a particular manufacturer's asbestos products.

Given petitioners' failure to raise the issue in the District Court or in their petitions for rehearing to the Court of Appeals, the lack of support in the record for some of petitioners' factual assertions, and the uncertainty of the basis of the Sixth Circuit's decision, respondent respectfully submits that plenary review of the Sixth Circuit's lessening of the insured's burden of proof is inappropriate. As this Court has noted in similar situations, it is inappropriate to consider in the first instance an issue which was not presented below and for which there is no support in the record. *Ramsey v. United Mine Workers,* 401 U.S. 302 at 312 (1971).

### B. This Case Does Not Involve Substantial Federal Questions and Is Therefore Not Worthy of Plenary Review

The fundamental issue in this case is the interpretation, under Illinois and New Jersey law, of the terms of various comprehensive general liability insurance contracts in the context of asbestos-related bodily injury claims asserted against an asbestos manufacturer, the so-called coverage theory. Although petitioners admit that there is no directly applicable substantive law of the two states on the particular issue, they nevertheless complain that the District Court, and the Sixth Circuit Court of Appeals, failed to acquit their respective duties to "ascertain from all available data what the state law is and apply it." *West v. American Telephone & Telegraph Co.,* 311 U.S. 223, 237 (1940).

A careful reading of the Sixth Circuit's decision, however, reveals that it analyzed pertinent state case law, principles of insurance contract interpretation, public policy considerations, and the medical evidence in reaching an informed assessment of what the applicable state law would be if the question were presented to the state courts.

Petitioners' disagreement with the result of that reasoned process is not, of itself, sufficient cause for this Court to second guess the Court of Appeals on a question of state law. Petitioners mischaracterize the issue as whether a federal court, exercising diversity jurisdiction, is "free" to adopt what it considers to be the "superior" rule. Instead, the issue is simply whether the Sixth Circuit, recognizing its *Erie* obligations, nevertheless failed to assess competently how the state courts would rule upon this complicated and unprecedented question of insurance law.

INA cites the opinion of Judge (now Justice) Stevens in the Seventh Circuit case of *Gates Rubber Company v. USM Corporation*, 508 F.2d 603 (7th Cir. 1975) as an example of how a Court of Appeals should follow the "all available data" mandate of *West v. AT&T, supra.* Judge Stevens in that case placed heavy emphasis upon underlying public policy considerations and notions of fairness in making his decision. *Id.*, 508 F.2d at 612, 613. The Sixth Circuit in this case likewise considered the underlying purposes, fairness, and policy rationales of the various state rules and cases in reaching an informed decision as to the likely decisions of the state courts. Nevertheless, petitioners would argue that, because the Sixth Circuit found their policy arguments unpersuasive, its decision did not comport with the *West* standard. Again, petitioners are really faulting the result, not the process by which it was derived.

This is not a case, therefore, of "judicial fiat," nor did the Sixth Circuit merely pay lip service to state law and proceed to adopt a rule that it felt was "superior." Faced with no controlling state authority, the Sixth Circuit reached a result that was founded upon the medical evidence and that harmonized with underlying important state public policy considerations. Such a determination cannot be said to be clearly wrong. *Huddleston v. Dwyer*, 322 U.S. at 237; *Estate of Spiegel v. Commissioner of Internal Revenue*, 335 U.S. 701 at 705, 706 (1949).

Even if this Court were to grant plenary review of this diversity case, a decision on the merits between the competing coverage theories would necessarily be limited to the applicable law of Illinois and New Jersey and would not bind other states. Such a decision would not even bind the highest courts of the states of New Jersey and Illinois: they would still be free, as the "final authority on state law", to fashion their own rules with respect to this issue. *Eisenstadt v. Baird,* 405 U.S. 438 at 442 (1972); *Hortonville Joint School District No. 1 v. Hortonville Educational Association,* 426 U.S. 482 (1976).

Because this Court could not issue a final, nationally authoritative statement of the law, plenary review is not warranted here. The uniformity in state laws sought by petitioners will not and cannot be achieved by review in this case.[5] Moreover, the hardships and complications

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[5] Petitioners also claim that there is a conflict among the federal courts, and that said conflict is a reason for granting the writ of certiorari. (Petitioners' supplemental brief, citing *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co. et al.,* Civ. Action No. 78-2739-Z (D. Mass., August 14, 1981); *Keene Corp. v. Insurance Company of North America, et al.,* Nos. 81-1180 and consolidated cases (D.C. Cir., filed February 1981). However, because each of the cases turns upon questions of state law, the conflict does not exist.

> "As to questions controlled by state law, however, conflict among the circuits is not itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts." *Ruhlin v. New York Life Ins. Co.,* 304 U.S. 202, 206 (1938), *reh. denied,* 309 U.S. 655 (1940).

Again, petitioners' request for national uniformity is misdirected. Respondent submits that the only truly effective, national resolution of these problems will be achieved, if at all, through the dramatized by petitioners, created by conflicting interpretations of identical policy language by various courts persist in many other areas of insurance law and would not be resolved by this Court's plenary review. The risk of inconsistent applications of identical policy terms is a risk assumed by every insurer that transacts business in more than one state.

### C. Petitioners Have Failed to Demonstrate That the Sixth Circuit's Decision Will in Fact, Exacerbate the Problems in the Administration of Justice Caused by the Avalanche of Asbestos Litigation

Petitioner Liberty invokes this Court's power of supervision, U.S. Sup. Ct. Rule 17.1(a), 28 U.S.C.A. (1980) to review the Sixth Circuit's decision, asserting that the adoption of the exposure theory will "severely disrupt the administration of justice in the thousands of asbestos cases which pend in the federal courts." (Liberty brief, p. 19). Petitioner INA contends that a "prompt and uniform resolution . . . of the fundamental coverage question" will have important practical consequences because it will determine responsibility for the handling of the suits against asbestos manufacturers. (INA brief, page 15).

Travelers also recognizes the desirability and social utility of a "uniform resolution" of the coverage question. This Court, however, cannot provide that resolution. There is simply no jurisdictional basis for this Court's determination of the coverage question for the entire nation. Any determination on the merits made by this Court, though

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voluntary efforts of concerned members of the insurance industry and the manufacturers, and not through litigation or federal legislation.

perhaps influential, cannot prevent the highest courts of the respective states from making their own considered and independent determinations of the same question. The "plague" of asbestos-related insurance litigation, which Liberty claims will result from the Sixth Circuit's decision, will not be abated by review in this Court. As the Sixth Circuit noted:

> "We think that the 'plague' will come regardless of how we decide this case." *Id.*, 633 F.2d at 1226, n. 29.

Liberty decries the complications created by the exposure theory, particularly as it impacts the insurers' duty to defend the claims against their insureds, arguing that each of the insurers presumably is entitled to hire independent defense counsel and control defense strategies. Where there are differences in opinion, Liberty contends, the trials of the underlying lawsuits will be turned into "logistical nightmares" as manufacturers and insurers "move to protect their interests." (Liberty brief, p. 21).

Lawsuits, however, involving multiple insurers, each with defense obligations, are not peculiar to asbestos or cumulative disease litigation. There are untold numbers of multiple-insurer situations which often result in litigation over "other insurance" clauses, primary versus excess liabilities, and respective obligations to defend or indemnify a mutual insured. Some of these cases may indeed be "logistical nightmares," but the enlightened segments of the insurance industry have evolved protocols and understandings to deal with these situations.

Liberty's alarmist position also ignores the economic realities of litigation. It would be senseless in most cases to duplicate defense efforts and expenses. Liberty presumes that defense teams and insurers are not capable of reaching agreement on such questions as which cases should be tried, settled or appealed, or what methods of discovery to pursue. Liberty also ignores the paramount concern of the insured about its own defense strategy and its contribution thereto.

Liberty claims that the "conflicts of interest which are inherent in the Sixth Circuit's collegial approach to insurance coverage" (Liberty brief, p 22) will wreak havoc with the insurer's defense obligation but ignores the whole complex of fiduciary obligations of an insurer, including the obligation to deal fairly with an insured and to take no action in the underlying lawsuit which prejudices the defense of an insured. *U.S. Steel Corp. v. Hartford A.&I. Co.*, 511 F.2d 96 at 101 (7th Cir. 1975) (applying Illinois law). Similarly, the duty of a defense attorney to protect the interests of the insured should alleviate, in large part, such problems. (See the Sixth Circuit's response to such an argument at 633 F.2d 1225, note 25.)

The "procedural quagmire" which Liberty fears will result from the exposure theory can be avoided, in large part, just as it was avoided in this case. The parties can agree to provide a defense and to handle the underlying lawsuits while they pursue a separate suit for declaratory relief without prejudice to the rights of any party to assert any claim or defense. (See the District Court opinion below, 451 F.Supp. at 1233, n.2).

Liberty also contends that settlements of underlying lawsuits will be inhibited, and follow-up lawsuits to apportion responsibility will result, because the exposure theory necessarily contemplates discovery of when exposures to a particular manufacturer's products occurred. This argument presupposes that "there is no record as to which exposures took place during which years." (Liberty brief, p. 23); the assumption is not well-founded. Any reasonable asbestos manufacturer has been aware, since 1978, if not before, of the possible application of the exposure theory (the District Court's opinion in this case was rendered on 4 May 1978), and most manufacturers advocate it. Prudence will have dictated reasonable attempts, during discovery in the defense of underlying lawsuits, to ascertain the exposure information which Liberty now contends to be unavailable.

Moreover, the leading case on the liability of the asbestos manufacturers to claimants requires the claimant to prove that he or she was exposed at some time to a particular manufacturer's products. *Borel, supra,* 493 F.2d 1076 at 1094 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974). Discovery directed toward the *fact* of exposure must necessarily develop occupational, geographical and temporal information which correlates with which manufacturers' products were used at certain times in certain sub-markets. Discovery concerning possible defenes based on the statute of limitations and the claimant's damages would also undoubtedly shed light on the duration and source(s) of exposure.

In sum, petitioners have not demonstrated that the exposure theory, in contrast to the manifestation theory, will markedly increase problems in the administration of justice. Each of the policy considerations advanced by petitioners is exaggerated, and none is peculiar to the asbestos-related coverage issue. This Court should not assume, as petitioners have, that the Sixth Circuit's decision is an administrative catastrophe. Trial court judges, both federal and state, who are faced with administering the asbestos-related litigation, as well as parties and their attorneys, have considerable incentive to fashion creative solutions to the many problems posed by the flood of asbestos-related litigation.

The resolution of the perplexing insurance issues created by the asbestos health problem, a problem that was not created by the insurance industry, can best be achieved, not through the kind of judicial legislation for which the petitioners call, but through the creative and voluntary efforts of manufacturers and insurers. All parties have more than enough incentives to resolve their disputes without calling upon the federal courts for the "easy" answers the courts cannot provide.

### D. The Sixth Circuit's Decision That Illinois and New Jersey Would Select the Exposure Theory Is Correct

The lack of controlling precedent in this case markedly distinguishes it from *West v. American Telephone & Telegraph Company, Inc., supra,* and *Stoner v. New York Life Insurance Company,* 311 U.S. 464 (1941), where the same issue had previously been determined in state litigation between the same parties. Nor have petitioners shown that the Sixth Circuit refused to follow directly applicable state law in violation of its *Erie* obligations. Cf., *Six Companies of California v. Joint Highway District No. 13 of California,* 311 U.S. 180 (1940); *Fidelity Union Trust Company v. Field,* 311 U.S. 169 (1941).

Instead, this case presents the best, reasoned judgment of the Sixth Circuit, in a situation in which it was required to "estimate" state law in enforcing "state created rights and state policies going to the heart of those rights . . ." *Bernhardt v. Polygraphic Company,* 350 U.S. 198, 208-9 (1956) (Frankfurter, J. concurring).

> As long as there is diversity jurisdiction, estimates are necessarily often all that federal courts can make in ascertaining what the state court would rule to be its law." *Id.,* 350 U.S. at 209.

The Court of Appeals and the District Court both painstakingly examined the relevant authorities and considered underlying public policy rationales in deciding that Illinois and New Jersey courts would follow the exposure theory. Such an estimate of unsettled state law by a federal court of appeals should not be disturbed unless it is demonstrably wrong. *Bank of Montreal v. Kough,* 612 F.2d 467, 472 (9th Cir. 1980); *Vance v. Universal Amusement Company,* 445 U.S. 308, 316 note 14 (1980).

The Sixth Circuit's determination of what the courts of Illinois and New Jersey would do under the same circumstances is not clearly erroneous. The decision is, in fact, an accurate prediction of what the courts of Illinois and New Jersey would rule to be their law.

### 1. Medical Evidence Supports the Exposure Theory

First, and of primary importance to both the Court of Appeals and District Court, is the medical evidence. Petitioners do not really dispute the medically-established mechanism of asbestos-related disease. They merely challenge the legal characterization of the medical findings as "bodily injury": "Each repetition of inhalation and reaction adds a tiny deposit of scar-like tissue . . ." *Id.*, 451 F.Supp. at 1236; "the medical evidence establishes that each tiny deposit of scar-like tissue causes injury to a lung. Each such insult causing injury is an occurrence." *Id.* 451 F.Supp. at 1239.

The Sixth Circuit, as well, was persuaded that the medical evidence invoked the more appropriate exposure theory, i.e., that each successive inhalation and deposit of asbestos fibers caused bodily injury: "the medical evidence is uncontroverted that bodily injury in the form of tissue damage takes place at or shortly after the initial inhalation of asbestos fibers." *Id.* 633 F.2d at 1222; ". . . there is universal medical agreement that the time when asbestosis manifests itself is not the time when the disease occurred." *Id.* 633 F.2d at 1219.

The exposure theory of coverage approximates the cumulative injury process as it is understood and explained by the medical evidence. Petitioners had their opportunity to present all the evidence they could muster in the District Court. That court and the Sixth Circuit concluded that "the medical evidence strongly supports the exposure theory." *Id.* 633 F.2d at 1218.

### 2. Products Liability Coverage Should Parallel the Underlying Theory of Liability

Both the District Court and the Court of Appeal took note of a fundamental principle of insurance contract interpretation, i.e., that insurance contracts should be interpreted so as to meet the reasonable expectations of the parties. Appleman, *Insurance Law & Practice*, § 4254

(1979); *J. L. Simmons Company, Inc. v. Fidelity & Casualty Company,* 511 F.2d 87 at 90 (7th Cir. 1975) (applying Illinois law); see *Swift & Co. v. London & Edinburgh Ins. Co.,* 130 Ill.App.2d 68, 264 N.E.2d 389 at 394 (1970).

The policies in issue were comprehensive general liability policies. The terms of coverage expressly contemplated that the insured could become "legally obligated to pay as damages because of . . . bodily injury. . . ." The liability policies thus were intended to protect the insured against the establishment of legal liability for payment of damages. *Bacon v. Amer. Ins. Co.,* 131 N.J.Super. 450, 330 A.2d 389 (1974), aff'd 351 A.2d 771 (1976).

The "legal obligation" in the underlying asbestos-related bodily injury claims is the manufacturers' failure to give adequate warning of the known and foreseeable dangers involved to foreseeable users of asbestos products. Under *Borel* the failure to warn is a continuous tort, resulting in the claimant's continuous exposure to asbestos products. Moreover, because "it is impossible, as a practical matter, to determine with absolute certainty which particular exposure to asbestos resulted in injury. . . ." (*Id.* 493 F.2d at 1094), the *Borel* court held that the manufacturers would be jointly and severally liable for the entire harm suffered by the claimant.

The Sixth Circuit noted that, if the theory of products liability coverage did not follow the theory of liability, the insured's coverage would be illusory. The manufacturer would likely be unable to secure any asbestos-related liability insurance coverage, after years of earlier exposures, in years when asbestos-related disease became manifest.

As a consequence, and because the courts of Illinois and New Jersey construe the kinds of policy language at issue here to maximize coverage, the Sixth Circuit correctly concluded that the theory of products liability insurance coverage should parallel the underlying theory of products liability. The exposure theory meets the reasonable expectations of the insured that it secured liability coverage that actually covered its liability to third parties, a liability that arises during the injury-causing process, not merely upon the manifestation of disease. The theory also yields a result which is consistent with the principles of insurance contract interpretation followed by the courts of Illinois and New Jersey. *Deodato v. Hartford Ins. Co.* (1976) 143 N.J.Super 396, 363 A.2d 361 at 364; *Great Central Ins. Co. v. Bennett* (1976) 40 Ill.App.3d 165, 351 N.E.2d 582 at 588.

### 3. The Exposure Theory Comports With the Plain Language of the Policies

There is no language in the policies which expressly requires the application of the manifestation theory of coverage. It is the occurrence of bodily injury during the policy period that triggers coverage, and, as noted by the Sixth Circuit, the definition of occurrence expressly includes "injurious exposure to conditions which result, during the policy period, in bodily injury." 633 F.2d at 1216.

Thus, the policies cover *occurrences* and not merely *manifestations* or discoveries of bodily injury, sickness or disease. In the context of a disease which consists of cumulative microscopic cellular trauma, such as in this case, the bodily injuries occur shortly after inhalation and deposit of asbestos fibers in the body. The exposure theory recognizes and treats such inhalations and resulting injuries as "occurrences."

### 2. The Pertinent State Cases and Authorities Were Properly Analyzed

The Sixth Circuit thoroughly reviewed the state law authorities presented to it. It adopted the District Court's "cogent discussion" of the state law principles governing insurance contract interpretation. *Id.*, 633 F.2d 1212 at 1219. It carefully analyzed the relevant cases and rules, taking into consideration the purposes and public policies underlying the various rules which the state courts apply to more or less analogous situations. *Id.*, 633 F.2d at 1220-1223. Such analysis is necessary if the court is to fulfill its judicial function. Moreover, such policy considerations and rationales would have been addressed by the state courts. See, e.g., *Nolan v. Johns Manville Asbestos & Magnesium Materials Company*, 70 Ill.App.3d 778, 392 N.E.2d 1352 (1979) [considerations of justice and fairness in an asbestos-related disease claim outweigh the desire for repose and administrative expediency, holding the discovery, or manifestation rule, applicable to the statute of limitations for an asbestos disease claim].

In contrast to the considerations presented by the statute of limitations cases, the manifestation rule would, as a practical matter, deny coverage to the insured in this case. (It is not the manifestation but the *exposure* to the insured's asbestos products that gives rise to all the manufacturers' liability in the underlying tort suit.) The policy objectives of interpretation of contracts in accordance with the parties' reasonable expectations and maximizing insurance coverage are distinct from and paramount to such considerations of repose and administrative convenience in the context here presented. *American Motorists Ins. Co. v. Squibb & Sons*, 95 Misc.2d 222, 406 N.Y.S.2d 658, 660 (1978); *Commercial Union Assurance Co. v. Zurich American Ins. Co.* (S.D.Ala. 1979) 471 F.Supp. 1011.

The Sixth Circuit also found that administrative convenience, the basis for the "last employer pays" rule in workmen's compensation claims, did not override the important principles of liability insurance contract interpretation present in the third-party tort liability situation. *Id.*, 633 F.2d at 1221, n. 16. Petitioners contend that the adoption of the exposure theory, with the resulting sharing of responsibility among insurers and insured for a single claim, clashes with the distinct state policies of easing the burden of claims administration. However, petitioners do not articulate just what the increased administrative burden is.

The "burden" of the exposure theory is simply the necessity of maintaining accurate records of all indemnity and claims-handling expenses so that they may be prorated among the insurers and insured over the respective covered and non-insured periods. The problem of which insurers have the duty to defend is no less under the manifestation theory, unless the complaint happens to spell out in careful detail precisely when the claimant's disease

—and its causal connection to asbestos inhalation—was discovered. Even under the manifestation theory, there will of necessity be some accountings between insurers and insured, and shifting of claims handling responsibilities, as discovery isolates the date(s) of manifestation for particular claimants. In short, the "inconvenience" postulated by petitioners is more imagined than real and consists primarily of an increased number of transfers of information and funds among the manufacturer and its insurers. Today, most insurers and manufacturers have the technical resources to meet this burden.

Petitioners' contention that the exposure theory contradicts state policies evidenced by the "health insurance" cases is overly simplistic. The health insurance cases rely upon the same rules of construction and insurance contract interpretation applicable here. The issue of when the disease occurs arises when a health insurer attempts to avoid coverage on the ground that the disease or disabling sickness predated the inception of the policy. In such a situation, the "manifestation" rule (no coverage until a disease is discovered or diagnosable as such) maximizes the insurance coverage available to the injured party, and assures that the insured will not be left unprotected.

The same considerations favor the adoption of the exposure theory in this case. If the manifestation rule is adopted, the manufacturer would be left, for all practical purposes, without coverage when the asbestos-related diseases—and underlying claims—are only now being discovered and asserted against it. The manifestation rule thus would be unfair not only to the insured, but also to the diseased claimants who might be deprived of compensation if liability insurance is unavailable to the insured.

## CONCLUSION

Because this case presents no substantial federal questions, and because the issue of the claimed departure from state law regarding the burden of proof is not adequately developed to review in the first instance, Respondent The Travelers Indemnity Company of Rhode Island requests that the writs be denied.

Respectfully submitted,

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(Appendix A follows)

## Appendix A

# CORPORATIONS AFFILIATED WITH RESPONDENT THE TRAVELERS INSURANCE COMPANY OF RHODE ISLAND

The Travelers Indemnity Company of Rhode Island is a subsidiary of The Phoenix Insurance Company, a subsidiary of The Travelers Indemnity Company. The following corporations are affiliates of The Travelers Indemnity Company of Rhode Island: The Travelers Indemnity Company of America and The Travelers Insurance Company of Illinois. The following corporations are affiliates of The Phoenix Insurance Company: The Charter Oak Fire Insurance Company, The Constitution State Insurance Company, and Travelers Reinsurance Company of Bermuda, Ltd. The following corporations are affiliates of The Travelers Indemnity Company: The Travelers Insurance Company, Caribbean Atlantic Life Insurance Company Limited, The Travelers Indemnity Company of Illinois, Travcan Limited (Non-Insurance), The Travelers Corporation of Bermuda Limited, The Travelers Corporation of Asia Limited (Inactive), The Travelers Life Insurance Company (Overseas) Ltd., The Prospect Company (Non-Insurance), and Keystone Custodian Funds, Inc. (Non-Insurance).

# Amicus Brief

# 1

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Nos. 81-198 & 81-199

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

INSURANCE COMPANY OF NORTH AMERICA and
LIBERTY MUTUAL INSURANCE COMPANY,
*Petitioners,*

*v.*

FORTY-EIGHT INSULATIONS, INC. and TRAVELERS
INDEMNITY OF RHODE ISLAND,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR ALLIANCE OF AMERICAN INSURERS AS AMICUS CURIAE

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## MOTION OF ALLIANCE OF AMERICAN INSURERS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Alliance of American Insurers (the "Alliance") hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief as amicus curiae, suggesting that this Court grant the petitions for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.[1]

The Alliance is a national trade association composed of over 140 property and casualty insurance companies. It was established in 1922 to serve its member companies and society at large in matters relating to insurance and the insurance industry. Its activities include the representation of the interests of member companies in a variety of public forums: in legislative bodies, in the regulatory environment, in the media and in such specialized fields as research, public affairs, claims, insurance taxation, loss control and education. It involves itself in legal services, issues of concern to claims executives, research and fact-finding. To serve these many functions, the Alliance is composed of a board of directors, advisory boards and committees, all comprised of member company executives, in addition to a full-time professional staff of approximately 80 persons to serve its members' needs. The Alliance has six regional offices involved in legislative and public affairs operations which utilize their experience and local involvement to implement the Alliance's policy positions. In addition, the Alliance maintains a staff in Washington, D. C. to present at the national level the Alliance's position on matters such as workers' compensation, antitrust law, occupational safety and health, property insurance and public affairs.

Many of the Alliance's member companies are faced with asbestos-related claims. Because of the great volume of those claims, their resolution has a significant impact on these companies and the public at large. The ruling of the court below will be determinative of how those claims are resolved. While the Alliance takes no position as to the merits of the Sixth Circuit's holding, it does wish to urge this Court to grant the petitions for certiorari to decide this issue of substantial significance. Therefore, the Alliance seeks leave to file the accompanying brief as amicus curiae.

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[1] Pursuant to Rule 36(3) of the Rules of this Court, the Alliance requested, but did not receive, the consent of the parties for the filing of the attached brief as amicus curiae.

Respectfully submitted,

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FOR THE SIXTH CIRCUIT

## BRIEF FOR ALLIANCE OF AMERICAN INSURERS AS AMICUS CURIAE

## INTEREST OF AMICUS CURIAE

The interest of amicus curiae is set forth in the accompanying motion for leave to file this brief as amicus curiae.

## SUMMARY OF ARGUMENT

The holding of the Sixth Circuit addresses a significant constitutional and federal statutory issue and will have a dramatic impact on the thousands of asbestos cases which have been and will be filed in the federal courts. While the Alliance of American Insurers (the "Alliance") takes no position as to the merits of the Sixth Circuit's holding, it does urge this Court to grant the petitions for a writ of certiorari to decide this important issue.[1]

## ARGUMENT

This is a diversity action involving the interpretation of standard comprehensive general liability insurance policies providing coverage in asbestos-related product liability cases. Those cases have been and will be brought by workers who allege that they contracted lung diseases by inhaling asbestos fibers contained in the products manufactured by Forty-Eight Insulations, Inc. ("Forty-Eight"). The court below recognized that the typical worker bringing suit has been or will have been exposed to asbestos fibers for at least ten years and sometimes more than twenty years before the disease manifests itself. 633 F. 2d at 1215. Consequently one of the issues in each of these suits is which of the various insurance policies held by Forty-Eight during that time period is responsible for defending and possibly paying the claim. Determination of that issue depends, in large part, upon which theory of insurance coverage is adopted—the "exposure" theory or the "manifestation" theory. The manifestation theory holds that asbestos-related diseases occur when symptoms become recognizable to the worker or his physician and that the insurance policy in effect at the time that such symptoms manifest themselves is responsible for coverage. The exposure theory, on the other hand, holds that *exposure* to asbestos products triggers coverage under the insurance policy in effect at the time of exposure to asbestos, regardless of when symptoms of an asbestos-related disease manifest themselves. The Sixth Circuit adopted the "exposure" theory and, in an attempt to implement the theory, reversed the ordinary burden of proof established under the applicable state law for insurance disputes. 633 F.2d at 1225-26 n. 27.[2] Insurance Company of North America and Liberty Mutual Insurance Company have filed petitions for a writ of certiorari for review of the court's holding.

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[1] It should be noted that a petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit was filed on July 31, 1981 in Aetna Casualty and Surety Company v. Porter, *et al.*, a case with issues similar to this action.

The ordinary burden of proof under applicable state law had held that an insured had the burden of proving that a particular insurance policy applied to the loss in question. *Id.*, citing ***Hays*** v. ***Country Mutual Insurance Co.***, 28 Ill. 2d 601, 192 N. E. 2d 855, 858 (1963); ***Warren*** v. ***Employers' Fire Insurance Co.***, 100 N. J. Super. 464, 242 A. 2d 635, 639 (1968) ***rev'd on other grounds***, 53 N. J. 308, 250 A. 2d 578 (1969). The court, however, reversed that burden and held that any insurance company which provided a policy to a manufacturer whose products a worker alleges caused him injury will have the burden of proving that the worker was not exposed to that manufacturer's products during the years the insurance policy was in effect. Failure to meet that burden will result in liability.

Because the Alliance is a trade association composed of member companies with diverse and divergent interests, it takes no position as to the merits of the holding of the Sixth Circuit or the legal position of any of the parties in this litigation. However, because it serves as a forum for the discussion and exchange of ideas concerning insurance issues, it is in a unique position to evaluate the dramatic impact which the reversal of the burden of proof in asbestos-related insurance cases will have upon the insurance industry and the public at large.

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[2] On August 14, 1981, the District Court for the District of Massachusetts adopted the "manifestation" theory causing a split in the decisions on this issue. Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co., *et al.* (Civ. No. 78-2739-Z, D. Mass., filed Aug. 14, 1981).

The petition of Liberty Mutual Insurance Company accurately describes the recent explosion in the volume of asbestos litigation and the strain which has been placed on the federal courts. The recent increase in volume is a result of the nature of asbestos-related diseases which do not manifest themselves until many years after exposure to asbestos. Because of the widespread use of asbestos during the past few decades in a variety of manufacturing settings, the effect of extended exposure to asbestos is now beginning to surface and the occurrence of the disease is increasing at an alarming rate. As the Sixth Circuit pointed out, Forty-Eight *alone* had been named as a defendant in 251 asbestos suits as of May, 1978. At the end of 1978, there were 800 such suits filed against it and over 1,370 such suits by the summer of 1979. 633 F. 2d at 1215. Considering the number of manufacturers who have used asbestos and the astonishing increase in the number of cases filed from year to year, the significance of the Sixth Circuit's holding on the administration of justice is apparent.

In addition, the Sixth Circuit recognized that it was departing from the general rule allocating the burden of proof in insurance coverage claims. 633 F. 2d at 1225 n. 27. While the Alliance takes no position as to the merits of such a departure, the petitions for certiorari reflect the significant constitutional and federal statutory principles involved in such a holding which are appropriate for this Court's review.

It is obvious that the placing of the burden of proof in these cases will often be determinative of the outcome. Because of the astonishing number of asbestos-related cases, the placing of that burden on the insurer rather than the insured is an issue which will be faced by virtually every federal court. The efficient and orderly resolution of these asbestos-related cases depends, in large part therefore, on the very issue which the petitions ask the Court to review. To avoid inconsistent and conflicting precedents and to spare unnecessary expense and judicial inconvenience in cases involving similar fact patterns, the Alliance urges this Court to grant the petitions and decide this critical issue.

## CONCLUSION

For the reasons stated above, the Alliance urges this Court to grant the petitions for a writ of certiorari.

Respectfully submitted,

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# Amicus Brief

## 2

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*vs.*

FORTY-EIGHT INSULATIONS, INC., and TRAVELERS INDEMNITY OF RHODE ISLAND,
*Respondents.*

## Motion for Leave to File Brief Amicus Curiae and Brief in Opposition Amicus Curiae.

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*Respondents*.

## Motion for Leave to File Brief Amicus Curiae.

American Home Assurance Company; National Union Fire Insurance Company of Pittsburgh, Pa.; Granite State Insurance Company; AIU Insurance Company; The Insurance Company of the State of Pennsylvania; New Hampshire Insurance Company and Lexington Insurance Company hereby request leave to file the attached Brief in Opposition to the Petition for Certiorari based upon the following:

1. Amici are insurance companies who have, at varying times, issued excess general liability policies to various manufacturers of products containing asbestos.

2. Amici have been sued by their insureds and other insurers in the following cases presently pending in the State Courts of California:

(a) *G.A.F. Corporation v. Insurance Company of North America, et al.* (No. C 286217) (Los Angeles County)

(b) *Armstrong Cork Company v. Aetna Casualty and Surety Company* (No. C 315357) (Los Angeles County)

(c) *Fireman's Fund Insurance Company v. Fibreboard Corporation, et al.* (No. 753885) (San Francisco County)

(d) *Johns-Manville Corporation, et al. v. The Home Insurance Company, et al.* (No. 765226) (San Francisco County).

3. In each of these cases the insured has *inter alia* sought a judicial declaration regarding the proper construction of certain terms of the respective policies. Specifically, the cases to a large extent turn on whether or not the California Courts find that the "exposure" or the "manifestation" theory of coverage applies in construing the term "occurrence" in these policies.

4. All four of these cases have recently been coordinated for all purposes before a single state judge pursuant to the California Rules of Court (designated as "Coordination Proceeding No. 1072"). The cases are presently in varying stages of pre-trial discovery.

5. In each case, *amici* have urged that the exposure theory of coverage is the correct construction of their respective policies under applicable state law.

6. The consent of the attorney for Petitioner has been requested but refused.

7. Amici believe that plenary review by this Court of any of the questions presented is unwarranted, and if

granted, may have a significant impact on the course of the litigation in California in which they are parties.

Respectfully submitted,

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FORTY-EIGHT INSULATIONS, INC., and TRAVELERS INDEMNITY OF RHODE ISLAND,

*Respondents.*

## Amicus Curiae Brief in Opposition.

*Amici Curiae* American Home Assurance Company; National Union Fire Insurance Company of Pittsburgh, Pa.; Granite State Insurance Company; AIU Insurance Company; The Insurance Company of the State of Pennsylvania; New Hampshire Insurance Company; and Lexington Insurance Company, respectfully urge that this Court refuse plenary review in this case and in part deny the Petition for Writ of Certiorari, seeking review of the Sixth Circuit's opinion in this case.

## REASONS WHY THE WRIT SHOULD BE DENIED AND PLENARY REVIEW NOT GRANTED.

### 1. This Case Does Not Involve Federal Questions and Is Not, as a Practical Matter, Worthy of Plenary Review by This Court.

The Petition seeks plenary review of essentially two holdings[1] of the Court of Appeals: first, whether under Illinois law the contract should be construed as providing coverage on an "exposure" basis, and second, whether the Court properly decided and allocated the burden of proof between insurer and insured regarding the existence of coverage in these cases. For the reasons that follow, we believe that the Petition should be denied with respect to the former and granted and simultaneously remanded with instructions regarding the latter.

At the outset it must be emphasized that this case only involves the interpretation of various insurance contracts. Indeed, Petitioner acknowledges that this case does not involve any federal issues and this alone is a compelling reason for denying *certiorari*. Moreover, the rule of this Court has long been established in diversity cases that where the District Court and Court of Appeals agree on the meaning and manner of applying state law, independent review in this Court is, for all practical purposes, foreclosed. *Bishop v. Wood*, 426 U.S. 345, 347 (1976).[2] And this is so regardless of whether or not the state courts have addressed the question. *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 629-630 (1945).

---

[1] Although three questions are actually presented for review, the first appears to be rhetorical in light of the well-established principles regarding the role of federal courts in diversity suits involving issues of state law.

[2] In *Bishop*, the Court of Appeals actually affirmed the District Court by an equally divided vote of the Court. *Id.* at 346.

Although the District Court was affirmed by the Court below,[3] Petitioner nevertheless urges that this Court find exceptional circumstances here and grant full review of the decision below. They argue that this case is worthy of review because of its overall impact on the nation's judicial system and the insurance industry (Pet. 12).

Although it is true that a large volume of lawsuits claiming asbestos-related injuries have been filed in the United States, this fact obviously will not be altered by granting the Petition or, for that matter, by reversing the lower court's opinion. Nor will a decision on the merits resolve, on a national basis, the exposure versus manifestation dispute which Petitioner asserts "encompasses every level of insurance coverage and has 'split the industry.' " (Pet. 12) At best, a decision on the merits will affect Illinois cases and perhaps settle Illinois law on the coverage question.

Petitioner speculates that the underlying litigations will be complicated if the Petition is not granted. Even if true, the effect of a decision on the merits by this Court would, of course, only have a direct effect on cases pending in the Illinois state courts or cases to be tried under Illinois law. This is precisely why diversity cases involving questions of state law alone rarely warrant review by this Court and this case is no exception. Also, there is simply no reason to assume that insureds and insurers will not join together in defense of these claims. Indeed, this has occurred to a great extent in California.

It is true that many persons have been harmed as a result of exposure to products containing asbestos. And it is also true that the administration and, if necessary, the adjudication of these claims may place substantial strains on the insurance industry and the courts. These administrative burdens are unfortunately inescapable and they will not be appreciably diminished by the granting of the Petition.

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[3] Section 3 *infra* points out that the Court of Appeals did depart from the District Court's ruling in one respect by addressing and deciding the burden of proof question.

Nevertheless, Petitioner suggests that the Court of Appeals', and, for that matter the District Court's, opinion adopting the exposure theory will exacerbate these problems (Pet. 26-7). Assuming this is a fact, however, lends no support to the Petition because inconvenience to the courts simply is not a proper judicial consideration in construing private contracts.

### 2. The Court of Appeals' Decision That Illinois Law Would Require the Coverage to Be Apportioned on an "Exposure" Basis Is Correct.

The Sixth Circuit was presented with the issue of when "bodily injury" occurs (as those terms are defined in the general liability policies) in a claimant who has contracted an asbestos-related disease. There are no authoritative Illinois decisions resolving this issue, and therefore, the District Court and Court of Appeals properly attempted to anticipate what an Illinois Court would decide in a like case. The Sixth Circuit did not reach this decision in a vacuum. Upon deciding that certain contractual terms require interpretation as applied to the context of progressive asbestos-related disease, it carefully evaluated policy considerations which are well established in state law, as well as relevant factual findings to conclude that the exposure theory applied.

In the absence of established state law, federal courts can and must make educated estimates of what the state courts would decide under like circumstances. The decision below thoroughly considered the authorities presented, as well as the obvious policy considerations which, of course, would have presumably been considered by an Illinois Court. For example, the Court below noted and was guided by the Illinois precedents that contracts are to be liberally construed in favor of the insured and against the insurer, and if there are ambiguities in the policy or uncertainty over its interpretation, the policy is to be construed against the insurer and in favor of the insured.

In discharging its responsibilities under *Erie*[4] and its progeny, the Court below considered related decisions of Illinois Courts. It correctly concluded that the "analogous" decisions discussed in the Petition did not resolve the manifestation versus exposure controversy in the context of applying general liability policies to asbestos-related claims. The Sixth Circuit reviewed, analyzed and rejected these decisions because the medical evidence, the expectations of the parties and the fundamental state policies applied in the asbestos-related injury context compelled a finding that the exposure theory would be adopted by the Illinois Courts.

The Sixth Circuit properly determined that the manifestation rule which applies in the worker's compensation cases would not be applied by Illinois Courts to liability insurance cases. The administrative considerations which are the fundamental basis for the "last employer pays" rule in worker's compensation cases do not outweigh the rules of contract interpretation applicable to liability insurance coverage cases. Likewise, health and accident insurance cases in Illinois also adopt the common rule that there is no coverage until a disease is diagnosable. The reason for this rule is that it promotes coverage for the insured and favors the legitimate expectations of the parties. Transferring this "diagnosable" rule to the liability insurance area would, however, result in precisely the opposite result. The manufacturer, under a manifestation rule, would be faced with the impossible task of obtaining insurance for periods of time when the asbestos-related diseases are becoming manifest themselves. Recognizing this, and bearing in mind Illinois general policy favoring coverage, the Court below in our view correctly predicted how Illinois Courts would react to this dilemma.

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[4] *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Precisely the same reasoning bottoms the Sixth Circuit's rejection of the Statute of Limitation cases which were also advanced by Petitioner. Transposing the Illinois rule limiting actions only after the disease or injury was manifested to the asbestos area would entirely undercut the reason for the rule in the first place — to promote coverage.

The Sixth Circuit thoroughly analyzed all the relevant state law and carefully evaluated the purposes of various analogous decisions. In the absence of any state court precedent, the Sixth Circuit properly fulfilled its responsibility to determine what the state courts would do with a similar case and arrived at a reasonable prediction of Illinois law. That decision should, therefore, be left undisturbed. *Spiegel's Estate v. Commissioner of Internal Revenue*, 335 U.S. 701 (1949).

### 3. The Court of Appeals Erroneously Decided and Allocated the Burden of Proving Coverage in This Case.

The Court of Appeals did depart from the District Court on the question of burden of proving coverage between the insured and the insurer. Recognizing that "the general rule is that the burden of proof to show coverage is on the insured" (Pet. App. A, 633 F.2d 1212, 1225), the Court of Appeals "simply reverse[d] the ordinary burden of proof and place[d] it on the insurer." (Pet. App. A, 633 F.2d 1212, 1226 n. 27).

Although we disagree with the Court's ruling in this respect,[5] we do not urge that the Petition be granted to review this aspect of the Sixth Circuit's decision. Rather, we urge this Court to vacate this portion of the opinion and remand the case with instructions to "ascertain from all available data what the state law is and apply it". *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237 (1940).

A remand is in order because it is unclear whether the Court below simply ignored the state law or concluded that its holding actually reflected the law of the state on this issue. This question is accentuated by the fact that the Sixth Circuit apparently did not have the benefit of briefs or argument from counsel regarding the allocation of the burden of proof under Illinois law. (See Petition of Liberty Mutual in No. 81-199 at 10 n. 11) Under these circumstances, it is entirely appropriate for this Court to simultaneously grant the Petition, vacate this portion of the opinion, and remand for full consideration of the state law in this area. Indeed, it may be necessary that the case be remanded to the District Court on this question in that it was raised *sua sponte* by the Court of Appeals. See: *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

## CONCLUSION.

Based upon the foregoing arguments and authorities, *amici* respectfully request that this Court 1) deny the Petition as to questions one and three and, 2) grant the Petition with respect to the second question presented and thereafter remand the case to the Court below with instructions as deemed proper to insure thorough consideration of the state law bearing on this issue.

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[5] Amici agree with Petitioner that the Sixth Circuit erred in this ruling and should review be granted, we would support reversal of that decision based upon the principles of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and the vast Illinois authorities pointed out by Petitioner.

Respectfully submitted,

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# Amicus Brief

## 3

MOTION FILED
NOV 16 1981

Nos. 81-198 and 81-199

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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1981

INSURANCE COMPANY OF NORTH AMERICA,
*Petitioner*,
v.
FORTY-EIGHT INSULATIONS, INC., and
TRAVELERS INDEMNITY OF RHODE ISLAND,
*Respondents*.

LIBERTY MUTUAL INSURANCE COMPANY,
*Petitioner*,
v.
FORTY-EIGHT INSULATIONS, INC., and
TRAVELERS INDEMNITY OF RHODE ISLAND,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

# MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* ARMSTRONG WORLD INDUSTRIES, INC., ET AL. IN OPPOSITION TO THE PETITIONS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

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Nos. 81-198 and 81-199

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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# MOTION OF ARMSTRONG WORLD INDUSTRIES, INC., ET AL. FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

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Pursuant to Rule 36.1, the following companies move for leave to file the included brief as *amici curiae* in opposition to the petitions for a writ of *certiorari*: Armstrong World Industries, Inc.; Fibreboard Corporation;

ACandS, Inc.; Amatex Corporation; Asten Group, Inc.; Brand Insulations, Inc.; Brinco Mining Limited; The Celotex Corporation; Crown Cork & Seal Company, Inc.; and Standard Insulations, Inc. Certain of the parties have refused to give written consent to the filing of this brief.

All but one of Amici at some time in the past manufactured, sold, installed or distributed products containing asbestos. Brinco Mining Limited was a miner of raw asbestos. In recent years, each of the Amici has been confronted with increasingly large numbers of lawsuits filed by persons alleged to have been injured as a result of contact with asbestos or asbestos-containing products.

Amici have a significant interest in the coverage provided under general liability insurance policies for claims for asbestos-related injuries. All but one of Amici are presently engaged in litigation with their respective carriers in various jurisdictions throughout the United States and Canada, as set forth in Attachment A to the included brief, in an effort to establish their insurers' obligations to cover these claims. Because the present case concerns the issue of coverage for asbestos-related claims under policy language that is similar or identical to that found in many of the policies of Amici, Amici have an important interest in the subject matter of this suit.

Through their extensive involvement with other suits, Amici have a perspective on the present case that is not shared by the parties and that has not yet been presented in the papers filed with the Court. In the included brief, Amici address the question whether the decision below presents any basis for the exercise of the Court's *certiorari* jurisdiction. Amici further would bring to the Court's attention the fact that the record below does not include certain evidence that is virtually conclusive against the petitioners' positions on the merits and the fact that the issues as presented to the court below were of a significantly limited nature.

Therefore, because of Amici's substantial interest in the subject matter of the case and their ability to address points that should, but have not been, brought to the Court's attention, it is respectfully requested that leave be granted to file the attached brief.

Dated: November 16, 1981

Respectfully submitted,

/s/ *Robert N. Sayler*
ROBERT N. SAYLER
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**On Petition for a Writ of Certiorari to the
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# BRIEF OF *AMICI CURIAE* ARMSTRONG WORLD INDUSTRIES, INC., ET AL. IN OPPOSITION TO THE PETITIONS

## INTEREST OF THE *AMICI CURIAE*

The petitions for *certiorari* refer to the pendency of other cases involving the question of insurance coverage for asbestos-related claims. All but one of Amici are parties to such litigation.[1] These suits involve issues similar, though not necessarily identical, to those raised in *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc.*, 451 F. Supp. 1230 (E.D. Mich. 1978), *aff'd*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing* (Mar. 9, 1981) ("*Forty-Eight Insulations*"). Generally, they involve the question of an insurer's duties to indemnify and defend its policyholder for asbestos-related claims according to the language of its policy, including the language that was the focus of the decisions in *Forty-Eight Insulations.*

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[1] A list of the pending suits of Amici is set forth in Attachment A hereto.

These suits have arisen because Amici, like Forty-Eight Insulations, Inc., have been named as defendants in numerous lawsuits in which the claimants seek damages for bodily injuries or death allegedly resulting from exposure to asbestos fibers contained in products formerly manufactured, sold, installed or distributed by one or more of Amici.[2] Each of Amici purchased comprehensive general liability insurance policies, including products liability coverage, continuously for a period of many years, with coverage for many Amici beginning in the 1930's.

Exposure to asbestos fibers can cause injury that ordinarily does not produce noticeable symptoms until some 10 to 40 years after the exposure began. For this reason, it was not until the 1970's that asbestos-related injuries that had begun with exposure many decades earlier became the subject of a significant number of third-party lawsuits. At that time, a large segment of the insurance industry, including the most significant insurers of Amici, simultaneously: (1) refused to offer any further coverage for asbestos-related claims or only offered coverage subject to massive deductibles or low limits; and (2) began taking the position, contrary to their practice prior to that time, that the only insurance that would apply to asbestos claims was that which the insurers refused to provide, namely, insurance in effect at the time the injuries become "manifest."[3]

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[2] One of Amici, Brinco Mining Limited, was only a miner of raw asbestos.

If adopted, the insurers' approach would eliminate virtually all coverage for asbestos-related claims against Amici. Although a company may have been fully insured throughout the period that it manufactured, sold, installed or distributed asbestos-containing products and individuals allegedly were exposed to those products, it nonetheless would be deprived of any insurance because the full consequences of the asbestos-related injuries would not become manifest until later years, when no insurance was available.

## SUMMARY OF ARGUMENT

Amici, like several of the parties to this case, take serious issue with certain of the conclusions reached below. We part company with these parties, however, in that we do not believe—despite our concerns about portions of the decision below—that this is an appropriate case for review on *certiorari*.

First, the Sixth Circuit's decision does not present an issue that, in light of this Court's well established precedent, is worthy of review on *certiorari*. This case involves a holding by a federal court of appeals in a diversity action on a matter of state law. To the extent that the Sixth Circuit encountered issues not yet decided by the relevant state courts, it attempted, as was its duty and as is routine in cases of this kind, to predict how the high courts of the states in question would rule on the matter.

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[3] Subsequently, some insurers propounded the "exposure" approach, which was adopted by the courts below. That approach, while recognizing that coverage applies to injuries beginning shortly after initial inhalation of asbestos even though such injuries may not become manifest until some later date, would improperly allow insurers to allocate a portion of their responsibility back to their insureds, thereby defeating the purpose for which such insurance was purchased.

Second, and perhaps more importantly, *Forty-Eight Insulations* presents a wholly inappropriate vehicle for review by this Court. As discussed below, the record in this case is critically deficient in several respects, thereby precluding full and fair consideration of the issues in dispute. Moreover, one of the most fundamental issues concerning the interpretation of the policies in the case, *i.e.*, the scope of an insurer's duty to indemnify its insured once coverage is triggered, was not even before the Sixth Circuit on appeal. Thus, even were the Court to consider granting *certiorari* in this case, *Forty-Eight Insulations*, with its inadequate record and limited issues, cannot provide the means by which fairly to resolve this matter.

For these reasons, Amici urge the Court to deny the petitions for *certiorari*. Alternatively, Amici request that the Court grant *certiorari* for the sole purpose of vacating and remanding the case to the district court for more complete development of the record.

## ARGUMENT

### I. THE SIXTH CIRCUIT DECISION PRESENTS NONE OF THE GROUNDS FOR CERTIORARI TRADITIONALLY ACCEPTED BY THIS COURT: PETITIONERS MERELY SEEK REVIEW ON THE MERITS OF A DECISION APPLYING STATE LAW.

It is axiomatic that this Court normally will not review a holding of a court of appeals on a matter of state law.[4] *Pierson* v. *Ray*, 386 U.S. 547, 558 (1967); *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944). And, it is undisputed that the Illinois and New Jersey courts have not decided the precise issues confronted by the court below. Thus, it was the duty of the Court of Appeals to ascertain the state law from all available data, and to apply that state law. *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 237 (1940). "As long as there is diversity jurisdiction, 'estimates' are necessarily often all that federal courts can make in ascertaining what the state court would rule to be its law." *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 209 (1956) (Frankfurter, J., concurring).

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[4] Indeed, compare the current version of this Court's Rule 17, which omits any reference to a court of appeals decision that resolves "an important state or territorial question in a way in conflict with applicable state or territorial law," with former Rule 19, which contained such a reference.

In discharging its duty, the Court of Appeals was required to use its own best judgment in predicting how the state court would decide the issue. *Amfac Mortgage Corp.* v. *Arizona Mall of Tempe, Inc.*, 583 F.2d 426, 434-35 (9th Cir. 1978). Moreover, where, as here, there is no discernible doctrinal trend in the courts, it is permissible for the federal court to assume that the state courts "will follow the rule that appears best to effectuate the policies that underlie the rule." *Bowen* v. *United States*, 570 F.2d 1311, 1322 (7th Cir. 1978).

The insurance industry wrote a policy that, as its title reflects, purports to provide *comprehensive* coverage for liability claims against the insured. Only two basic constructions of the policy were urged by the parties to the Court of Appeals, neither of which Amici believe to be a correct construction. Given the limited alternatives being pressed upon it, and in the absence of any controlling state law on an issue of first impression, the court adopted the construction (so-called "exposure") that would provide some, though less than complete, coverage and rejected the construction ("manifestation") that would have defeated coverage, *Forty-Eight Insulations*, *supra*, 633 F.2d at 1219-23. Thus, the court's conclusion that "Illinois and New Jersey courts would try to construe the contract language to embrace the exposure theory," is consistent with state law. *Id.* at 1222-23.

Having lost squarely on the merits in both the district court and the Court of Appeals, however, insurers urging the "manifestation" interpretation now seek review by this Court on the basis of a corollary issue in a single footnote: The insurer's burden of proof. As to that, their argument is that the court below misapplied state law in allegedly shifting to the insurers the burden of proving non-coverage. Their position is in error.

The insurers argue that "[i]t is textbook law . . . that in a coverage dispute it is the insured which has the burden of proving all of the facts necessary to establish that the policy applies to the loss in question". (Liberty Mutual pet. at 9.) But, the burden of proof in a coverage dispute is neither that simple nor straightforward. In point of fact, a number of jurisdictions, including New Jersey, place this burden on the insurer.[5]

As discussed below, the Sixth Circuit's ruling that, as a matter of substantive state law, insurance coverage in this matter is triggered by exposure to asbestos *mandated* that the burden of proving non-coverage be placed upon the insurers. To rule otherwise would have had the dual effect of rendering Forty-Eight's insurance coverage totally illusory and of making the court's substantive ruling on exposure-based liability an exercise in judicial futility.

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[5] For example, the Supreme Court of New Jersey "readily agreed . . . as a statement of general principles" with plaintiff's claim that "plaintiff could have rested after establishing a prima facie case of liability by showing the burning of the aircraft," and that his "insurer, in order to escape liability, must prove that the fire was produced" by one of the excluded causes of injury. James v. Federal Ins. Co., 5 N.J. 21, 73 A.2d 720, 723 (1950). *See also* Chase Rand Corp. v. Central Ins. Co. of Baltimore, 63 F.Supp. 626 (S.D.N.Y.), *aff'd*, 152 F.2d 963 (2d Cir. 1945).

As the Sixth Circuit itself noted, it was confronted with a novel situation. Because of the nature of the injury resulting from exposure to asbestos and the consequent liability that has been held to attach to an insured, an insured typically is held liable for all of a claimant's damage if there was exposure to its product at any time, even if it cannot be shown when that exposure occurred. *See, e.g., Borel* v. *Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). To require that an insured nevertheless prove precisely when exposure occurred as a precondition to obtaining coverage would mean that although a company may have had insurance policies in effect continuously throughout the applicable period, it never could recover on this insurance because of the impossibility of establishing which exposures occurred under which policies. The insurers all too well recognize the practical implications of such a position. (Liberty Mutual pet. at 8-9.)

There simply is no rule of state law requiring that an insured be held to a stringent burden of proof in the circumstances of this case: petitioners' arguments to the contrary are merely wishful speculation. The Court of Appeals did no more than reasonably could be expected of any court, federal or state, under the same circumstances. It recognized that comprehensive general liability policies are intended to provide coverage for all forms of liability and declined to defeat this coverage. Such an approach is necessary if the protection intended by insurance is to be accommodated to evolving doctrines of tort law.

For the foregoing reasons, the decision rendered below contains nothing at all to command the attention of this Court. Taken together, the variety of conflicting "reasons" put forth in the petitions seeking *certiorari* make a telling point that there are no real grounds to support its being granted. The petitions of INA and Liberty Mutual implicitly acknowledge the absence of any controlling state law, while the position of *amici* London insurers characterizes the decision as being in conflict with "settled" law. INA criticizes the Court of Appeals for not using the proper methodology in searching for admittedly non-existent state law, and urges this as a reason that this Court should undertake a search of its own. Liberty Mutual acknowledges that the decision presents no grounds for *certiorari* on the central issue of the extent of coverage (pet. at 6-7), and then proceeds to urge a full review of this issue on the merits (*id.* at 19, *et seq.*). Some insurers urge a review of all issues, others of only one, and another urges abstention.

If a substantial basis for *certiorari* indeed exists, it should have found consistent articulation in the petitions filed with the Court. But what the petitioners in fact seek, yet avoid saying, is that the Court depart from its traditional role and established precedent and grant *certiorari* in circumstances that have not justified *certiorari* in the past and for reasons that are contrary to the Court's historic view of its role in the federal system.

The petitioners acknowledge that this Court does not sit to ensure the correctness of the decisions of federal courts in applying state law or to promote the consistency of decisions in this area through the development of a form of federal common law. Yet petitioners nonetheless suggest that the matter is one with nationwide implications that somehow is capable of a "uniform resolution" through review by the Court (INA pet. at 14-15). The significance of a case to a party concerned, however in the absence of other factors warranting Supreme Court review, is an insufficient basis upon which to urge the *certiorari* jurisdiction of this Court. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Petitioners' assertions that this case has nationwide implications cannot alter the salient fact that this case involves an interpretation of insurance contracts under state law.

While acknowledging that were the Court to grant *certiorari*, it could do no more than decide a dispute between the parties to the case based on state law, the petitions are fraught with the implication that the Court should attempt to do more. They would have the Court use this case as a vehicle to render an opinion on the assumption that state courts in other actions would feel bound by the Court's determination on a matter of state law. It never has been the practice of this Court to preempt the prerogatives of the state courts in this fashion, even in order to protect parties from the prospect of multiple litigation or conflicting results. Any such conflicting results would be "merely corollary to a permissible difference of opinion in the state courts." *Ruhlin* v. *New York Life Insurance Co.*, 304 U.S. 202, 206 (1938).

The present case, therefore, is an "exceptional" one only because of what petitioners urge this Court to decide. Under the traditional rules that this Court has employed, this case simply does not merit *certiorari*.[6] This is so especially where, as here, both the district court and the Court of Appeals concur in their analysis. *Id.*; *Bishop* v. *Wood*, 426 U.S. 341, 345-46 (1976); *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620, 630 (1946).

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[6] Moreover, because of the state law issues involved, to the extent that the *Forty-Eight Insulations* decision is not in accord with the recent decision in Keene Corp. v. Ins. Co. of North America, Nos. 80-1179-81 (D.C. Cir. Oct. 1, 1981), there is no conflict in the federal system that would warrant this Court taking the case.

## II. THIS CASE PRESENTS AN INAPPROPRIATE VEHICLE FOR REVIEW AND WOULD PRECLUDE A FULL AND FAIR CONSIDERATION OF THE ISSUES.

Even if there were a legitimate basis for the exercise of this Court's *certiorari* jurisdiction, this particular case should not occasion the exercise of that jurisdiction because of the limited issues presented and deficiencies in the record.

The present suit was filed by INA against one of its smaller insureds shortly after INA changed the manner in which it had been handling asbestos-related claims. *See Forty-Eight Insulations, supra,* 451 F.Supp. at 1239. The purpose of the suit was to attempt to obtain prompt judicial sanction for INA's new "theory" of coverage. This theory—"manifestation"—had consequences for Forty-Eight Insulations and other insureds that have been noted *supra.*

The record in this case bears the mark of the circumstances under which it was filed and prosecuted. Discovery in other actions to which Amici are parties, although not yet nearly complete, has revealed that much information of critical significance is not in the record in *Forty-Eight Insulations.* We mention here only two of the more critical deficiencies in that record.

First, although the petitioners seek an opportunity to argue to this Court that their insurance policies are clearly meant to provide coverage only when an injury or disease becomes "manifest" during a policy period, the term "manifest" is not to be found in any form in the policy language. The omission is not unintentional.

Since the district court decision was rendered in this case, the insureds in other pending actions have discovered documents from several insurance industry associations, including minutes and other writings generated by the industry committees that were responsible for drafting the policy language.[7] While we are not in a position to say whether certain of these documents should have been produced in the *Forty-Eight Insulations* case, the fact is that they were not, and thus were not available for consideration by the courts below.

These documents reveal that when drafting the very policy language at issue in this case, the insurers considered specifying that injury or disease resulting from exposure to conditions would be deemed to occur for coverage purposes only when such injury or disease becomes "manifest". To accomplish this result, drafts of policy language were prepared that were keyed to the word "manifest". The insurance industry documents make clear, however, that after due consideration the insurers decided, for a number of reasons, that they *did not want* coverage to be triggered in this manner and eliminated the "manifestation" language from the policy drafts.

Other documents, also not part of the record below, reflect contemporaneous statements by the industry members responsible for drafting the policy form at issue that "manifestation" had been rejected as the only trigger of coverage. Still other documents, again not found in the record, show that in response to the financial liabilities presented by asbestos and similar claims, the insurance industry has undertaken in recent years to revise the policy and, in the process of doing so, has acknowledged expressly that the current policy does *not* make coverage contingent only upon "manifestation" and *must be rewritten* in order to do so.

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[7] As noted *supra*, on October 1, 1981, the Court of Appeals for the District of Columbia decided Keene Corp. v. Ins. Co. of North America, involving interpretation of the standard-form comprehensive general liability policy. The record in *Keene* contains some of the critical evidence that is missing from the record in *Forty-Eight Insulations*; but even the *Keene* record, containing a nine volume appendix, has significant omissions in this regard.

Second, the Court of Appeals found that the costs of a claim should be prorated over the years a claimant was exposed to asbestos, and that an insured should bear a portion of these costs for any year in which it is unable to prove that it had insurance. Forty-Eight Insulations, however, did not even dispute in the Court of Appeals that indemnity costs should be imposed upon it in this manner. *See Forty Eight Insulations, supra*, 633 F.2d at 1224. Yet, included among the documents produced to Amici in other cases, but again not part of this record, is evidence indicating that the insurers contemplated that in circumstances such as those presented by asbestos-related claims, any one of a number of different policies could be responsible for the *entirety* of an insured's liability and that under no circumstances could costs be prorated to an insured.

It is understandable that petitioners would press to have their "manifestation theory" reviewed on the basis of the severely limited record in the present case; they will never again have so favorable an opportunity. But while the gross deficiencies in the record may serve the ends of petitioners, they clearly do not serve the ends of justice.

The determination whether to grant *certiorari* rests upon the considered discretion of the Court. Inadequacies in the record, or in the presentation of the issues in the court below, provide grounds in themselves for this Court to decline to exercise this discretion. *Cf. The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

## CONCLUSION

For all of the foregoing reasons, Amici urge that the Court deny the petitions for *certiorari*. Alternatively, Amici urge the Court to grant the petitions only for the purpose of remanding the case for a more complete development of the record in the court below. *See Skelly Oil Co.* v. *Phillips Petroleum Corp.*, 339 U.S. 667, 677-78 (1950).

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## ATTACHMENT A

## PENDING ASBESTOS INSURANCE LITIGATION INVOLVING AMICI[1]

*Armstrong World Industries, Inc.* v. *Aetna Casualty & Surety Co., et al.*, No. C-315367 (Super. Ct., Los Angeles Cty., Ca., originally filed March 6, 1980 and amended March 19, 1981)*

*ACandS, Inc.* v. *Aetna Casualty & Surety Co., et al.*, No. 80-1341 (E.D. Pa., Oct. 6, 1980, *amended* Oct. 20, 1980), *app. docketed* No. 80-2659 (3d Cir. Nov. 3, 1980)

*American Universal Insurance Co.* v. *Amatex Corp.*, No. C-328207 (Super. Ct., Los Angeles Cty., Ca., filed June 24, 1980) and *American Universal Insurance Co.* v. *Aetna Casualty & Surety Co. and Amatex Corp.*, No. 80-0098 (E.D. Pa., filed Jan. 8, 1980)

*Asten Group, Inc., t/a Asten-Hill Co.* v. *Commerce & Industry Insurance Co., et al.*, No. 58-19 (Ct. of Common Pleas, Philadelphia Cty., Pa., filed July 15, 1980)

*Brinco Mining Limited* v. *Commercial Union Assurance Company Limited, et al.*, Nos. 38794/79, 45442/79, 53672/80, 4170/81 (S.Ct., Ontario, Canada)

*The Celotex Corporation* v. *Aetna Casualty & Surety Co.*, No. 79-5885 (Cir. Ct., Hillsborough Cty., Fla., filed May 16, 1979)

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* These cases have been coordinated with *GAF Corp.* v. *Insurance Company of North America, et al.*, No. C286017 (Super. Ct., Los Angeles Cty., Ca., filed May 31, 1979) and *Johns-Manville Corporation, et al.* v. *The Home Insurance Company, et al.*, No. C765-226 (Super. Ct., San Francisco Cty., Ca., filed March 31, 1980) *sub. nom. In re Asbestos Insurance Coverage Cases*, No. 1072 (Super. Ct., San Francisco Cty., Ca.).

[1] Amicus Brand Insulations, Inc. is not currently involved in such litigation.

*Crown Cork & Seal Company, Inc.* v. *Aetna Casualty & Surety Co., et al.*, No. 1292 (Ct. of Common Pleas, Philadelphia Cty., Pa., filed Sept. 12, 1978)

*Firemen's Fund Insurance Company* v. *Fibreboard Corporation, et al.*, No. C753-885 (Super. Ct., San Francisco Cty., Ca., filed May 29, 1979) •

*Standard Asbestos Manufacturing & Insulating Co.*[2] v. *Royal Indemnity Insurance Co., et al.*, Civ. 80-14909 (Cir. Ct., Jackson Cty., Mo., filed July 13, 1979)

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[2] Standard Asbestos is now Standard Insulations, Inc.

# Amicus Brief

## 4

MOTION FILED
SEP -1 1981

Nos. 81-198 and 81-199

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

INSURANCE COMPANY OF NORTH AMERICA,
*Petitioner,*
v.
FORTY-EIGHT INSULATIONS, INC., and
TRAVELERS INDEMNITY OF RHODE ISLAND,
*Respondents.*

LIBERTY MUTUAL INSURANCE COMPANY,
*Petitioner,*
v.
FORTY-EIGHT INSULATIONS, INC., and
TRAVELERS INDEMNITY OF RHODE ISLAND,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

# MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* and BRIEF IN PARTIAL OPPOSITION AND PARTIAL SUPPORT OF *AMICUS CURIAE* HARTFORD ACCIDENT & INDEMNITY COMPANY

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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# MOTION TO FILE BRIEF *AMICUS CURIAE* FOR HARTFORD ACCIDENT & INDEMNITY COMPANY

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Hartford Accident & Indemnity Company moves for leave to file the attached brief *amicus curiae*[1] in opposition to the Petitions for Writ of Certiorari on the insurance coverage issues, but in support of the Petitions for Writ of Certiorari on the single issue of the burden of proof raised by Question 2 of the Petition in No. 81-198 and Question 1 of the Petition in No. 81-199.

1. Hartford Accident & Indemnity Company (hereinafter "Hartford") is an insurance company which has issued general liability insurance policies to asbestos manufacturers. Hartford is a proponent of the "injurious exposure theory" of insurance coverage which was adopted by the Sixth Circuit in this case and by the Fifth Circuit in *Porter* v. *American Optical Corp.,* 641 F.2d 1128 (5th Cir. 1981), *petition for cert. filed,* 50 U.S.L.W. 3024 (U.S. July 31, 1981) (No. 81-200).

2. *Amicus* Hartford seeks leave to file the attached brief because the pending Petitions for Writ of Certiorari challenge the "injurious exposure theory" of which Hartford is a leading proponent. Hartford participated as *amicus curiae* in the Sixth Circuit in this case and was a party in the Fifth Circuit case of *Porter* v. *American Optical Corp., supra,* which is likewise now pending before the Court on a Petition for a Writ of Certiorari.

3. Hartford has this date filed a brief in opposition to the Petition for Writ of Certiorari in the *Porter*

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[1] The parties have refused written consent to the filing of the brief in partial opposition to and partial support of the Petitions for Writ of Certiorari.

case, No. 81-200 in which Hartford is a party. Inasmuch as the two cases raise identical issues concerning the injurious exposure theory, Hartford seeks leave to file a similar brief in the instant case as an *amicus curiae.*

## CONCLUSION

Because *amicus* Hartford has a substantial interest in this case, and because its brief presents an important perspective on the issues before this Court different than that of the parties, this motion for leave to file a brief as *amicus curiae* should be granted.

Respectfully submitted,

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF IN PARTIAL OPPOSITION AND PARTIAL SUPPORT OF *AMICUS CURIAE* HARTFORD ACCIDENT & INDEMNITY COMPANY

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Petitioners Insurance Company of North America ("INA") and Liberty Mutual Insurance Company

("Liberty"), collectively "Petitioners," have asked this Court to issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on October 21, 1980 and modified on March 5, 1981.[1] *Amicus* Hartford Accident & Indemnity Company ("Hartford") urges this Court to deny the instant Petitions, except insofar as the Petitions concern the unprecedented ruling of the Sixth Circuit in reversing state law of burden of proof.[2]

## INTEREST OF THE AMICUS

As set forth in the motion for leave to file this brief, *amicus* is an insurance company which has issued general liability insurance policies to asbestos manufacturers and which is a leading proponent of the "injurious exposure theory" of coverage adopted by both the trial court and the Court of Appeals in this case. *Amicus* Hartford participated in the proceedings before the Court of Appeals in this case as an *amicus* and was a party in the Fifth Circuit case of *Porter* v. *American Optical Corp.,* 641 F.2d 1128 (5th Cir. 1981), *petition for cert. pending,* 50 U.S.L.W. 3024 (U.S. July 31, 1981) (No. 81-200), which involves interpretation of the same policy language. *Amicus* believes that the decisions of both Courts of Appeals on the insurance coverage issues are correct as a matter of state law and that the considered determinations of state law by these intermediate appellate courts present no question worthy of review by this Court. However, *amicus* Hartford supports limited review of that portion of the decision of the Sixth Circuit which expressly disregarded state law of burden of proof in violation of *Erie R. Co.* v. *Tomkins*, 304 U.S. 64 (1938).

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[1] The original opinion is reported at 633 F.2d 1212 and reprinted at p. A6 of the Appendix ("App.") to the Petition for a Writ of Certiorari by INA ("INA Pet."). The modified opinion is reprinted at INA Pet. App. A1.

[2] This burden of proof issue, on which Amicus Hartford supports review, is contained in question 2 of the Petition in No. 81-198 and question 1 of the Petition in No. 81-199.

## REFUSAL OF PARTIES TO CONSENT

The parties have refused written consent to the filing of this brief.

## SUMMARY OF ARGUMENT

The insurance coverage issue in this case presents solely a question of state law which this Court ordinarily declines to review. The considered determination of state law by the Court of Appeals, where there were no state precedents directly on point, fully satisfied the rule of *Erie R. Co.* v. *Tomkins*, 304 U.S. 64 (1938). No other constitutional or federal question is presented on the insurance coverage issue.

This diversity case involving the narrow issue of state law construction of the term "bodily injury" in an insurance policy does not present any exceptional circumstances which justify review. This decision of the Sixth Circuit is in full accordance with the Fifth Circuit, the only other circuit which has considered this issue. Review by this Court would not promote the nationwide uniformity sought by petitioners because the Court's review would apply solely to the law of the states of Illinois and New Jersey.

Moreover, the Court of Appeals correctly ruled as a matter of state law that the terms of the insurance policies and the medical evidence in this record supported the conclusion that insurance policies covering "bodily injury" for asbestos-related claims must be construed by reference to injurious exposure to asbestos, not to ultimate manifestation or diagnosis many years later of asbestos-related disease. The exposure theory is administratively workable.

However, the Court of Appeals erred in expressly disregarding authoritative state law and reversing the ordinary burden of proof. Such a holding was a clear violation of its duty to interpret and apply state law in the diversity action. This is the only issue worthy of review by this court.

## REASONS FOR DENYING THE WRIT

1. This Court does "not ordinarily review the holding of a court of appeals on a matter of state law." *Pierson* v. *Ray*, 386 U.S. 547, 558 n.12 (1967); *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944). Petitioners concede that this case involves solely the application of state laws of New Jersey and Illinois to the interpretation of certain insurance policies.[3] Accordingly, this Court should decline review of the insurance coverage issues.

Petitioners contend that the Court of Appeals erred in its interpretation of state law. However, Petitioners admit that, on the insurance coverage issues, there were no state law cases on point construing the specific policy language "bodily injury" in the contest of a cumulative disease.[4] Where as here, there was no established law of the state construing the insurance policies in the unique context of asbestos claims, educated estimates and predictions "are necessarily often all that federal courts can make in ascertaining what the state court would rule to be its law." *Bernhardt* v. *Polygraphic Co.,* 350 U.S. 198, 209 (1956) (Frankfurter, J., concurring).

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[3] INA Pet. 16; Liberty Pet. 6-7. *Amicus* Hartford agrees with Petitioner Liberty that the only issue worthy of review by this Court is the burden of proof determination.

Petitioners cannot dispute that the Sixth Circuit, after a thorough review of the cases from Illinois and New Jersey, concluded that "we think that Illinois and New Jersey courts would try to construe the contract language to enhance the exposure theory." INA Pet. App. A25. Thus, the Sixth Circuit fully met its obligations under *Erie R. Co.* v. *Tomkins,* 304 U.S. 64 (1934) and *West* v. *American Telephone & Telegraph Co.,* 311 U.S. 223, 237 (1940) to choose the rule it believed the courts of Illinois and New Jersey were likely to adopt. Petitioners' mere disagreement with the Court of Appeals' interpretation of state law does not raise issues worthy of review by this Court. *Huddleston* v. *Dwyer, supra,* 322 U.S. at 237.

Moreover, the decision of the Court of Appeals is in accordance with the only other decision of a federal Court of Appeals on the same issue.[5] Petitioners' fear about the dire consequences of a future split of authority on this issue is mere conjecture. See INA Pet. 14-15. Such hypothetical consequences do not justify review by this Court at this time.

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[4] *Ibid.*

[5] Porter v. American Optical Corp., *supra.* Two district courts have considered the issue and reached different results. Compare Keene Corp. v. Insurance Co. of North America, 513 F. Supp. 47 (D.D.C. 1981), appeal docketed, Nos. 81-1197 et seq. (D.C. Cir. 1981) (adopting the injurious exposure theory) with Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co. , C.A. No. 78-2739-2 (D. Mass. Aug. 14, 1981) (adopting manifestation theory).

Moreover, review by this Court would not preclude divergent interpretations by courts of other states, in any event. Even if this Court were to grant review of this diversity case, review would be limited to the applicable laws of the states of New Jersey and Illinois. A decision by this Court on these narrow state law issues would not bind other states, and might not even bind New Jersey and Illinois if the highest courts of these states subsequently rule on this issue.[6] In the absence of constitutional or federal questions, this Court simply does not have the jurisdiction to establish a national law of construction of insurance policies. Accordingly, review by this Court would not promote the uniformity in state laws which petitioners seek.

2. It is axiomatic that the interpretation of an insurance policy is governed by the language of the policy itself.[7] The decision of the Court of Appeals

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[6] This Court has often recognized that it is the highest court of the state which is the "final authority" on state law, *e.g.*, Sandstrom v. Montana, 442 U.S. 510, 516 (1979), and that this Court is bound by that state court's interpretation of state law. *E.g.*, Hortonville Joint School District No. 1 v. Hortonville Education Ass'n, 426 U.S. 482, 488 (1976).

[7] *E.g.*, Imperial Interprises, Inc. v. Fireman's Fund Insurance Co., 535 F.2d 287, 290 (5th Cir. 1976); Hartford Fire Insurance Co. v. Shapiro, 270 Ala. 149, 117 So.2d 348, 352 (1960). This general rule is followed in both Illinois and New Jersey whose laws govern the instant diversity action. *See e.g.*, Canadian Radium Corp. v. Indemnity Insurance Co. of North America, 411 Ill. 325, 104 N.E.2d 250 (1952); Boswell v. Travelers Indemnity Co., 38 N.J. Super. 599, 120 A.2d 250 (1956).

is unquestionably correct because the insurance policies expressly provide that it is the occurrence of bodily injury, not manifestation, which triggers insurance coverage. While the language of the policies varies slightly, the essential terms of each policy are the same. Coverage is provided for "bodily injury" defined as "bodily injury, sickness, or disease . . . which occurs during the policy period." INA Pet. App. A12.

Despite the clear language of the policies, Petitioners INA, Liberty and others cling to the position that the policies cover only liability arising from bodily injury which becomes "manifest" during the policy period. However, Petitioners can point to no language of the policy which limits coverage to "manifestation" of injury. Indeed, the pertinent policy language does not even mention the term "manifestation." Instead, the policies expressly provide for coverage based upon the occurrence of "bodily injury" during the policy period. To the extent that "bodily injury" occurs prior to "manifestation," as both the district court and the Court of Appeals found with respect to asbestos-related injuries, the date of manifestation is simply irrelevant.

The policy language specifically provides coverage for "bodily injury" itself as well as for "sickness or disease." Petitioners INA and Liberty, as proponents of a manifestation theory, would read out of the policies altogether the coverage for "bodily injury" and require manifestation of a "disease." However, as the Sixth Circuit correctly recognized, "It is tautological that bodily injury can be 'bodily injury' and is not necessarily just a 'disease'. The medical evidence is uncontroverted that 'bodily injury' takes place at or shortly after the initial inhalation of asbestos fibers." INA Pet. App. A26. Indeed, the courts have long recognized that for insurance coverage purposes, the term 'bodily injury' includes any 'localized abnormal condition of the living body'. *See* Appleman, ***Insurance Law and Practice,*** § 355 at 641 (1965). To the extent that such 'localized, abnormal conditions' develop shortly after exposure to and inhalation of asbestos, regardless of when symptoms of disease ultimately manifest themselves, the policy language mandates coverage whenever exposure causes such "bodily injury" prior to manifestation.

Indeed, the Sixth Circuit succinctly stated "Bodily injury should be construed to include the tissue damage which takes place upon initial inhalation of asbestos. That is both a literal construction of the policy language and the construction which maximizes coverage." INA Pet. App. A28-A29. Adoption of the manifestation theory, on the other hand, as urged by Petitioners, would read out of the policy altogether the critical term "bodily injury." Such a strained construction of the policy language is obviously incorrect, where, as here, it takes only "a straightforward interpretation of the policy language . . . to adopt the exposure theory." INA Pet. App. A26.

3. The decision of the Court of Appeals is also supported by the pertinent medical evidence which demonstrates that asbestos-related "bodily injury" occurs long before manifestation. The trial court in this case held, on the basis of extensive medical evidence, that bodily injury occurs during the course of exposure to and inhalation of asbestos, often many years prior to the time of manifestation. INA Pet. App. A59-A61. The trial court explained that each time asbestos fibers are inhaled and become embedded in the lungs, scarring or walling of the fibers takes place in lung tissue.

INA Pet. App. A59-A61. "Each repetition of inhalation and reaction," the District court found, adds a "tiny deposit of scar-like tissue" which "causes injury to a lung" within a short period, culminating eventually in diagnosable disease such as asbestosis. INA Pet. App. A59-A61.

The Court of Appeals similarly concluded that "the medical testimony strongly supports the exposure theory." INA Pet. App. A17. The Court noted that "there is a universal medical agreement that the time when asbestos manifests itself is not the time when the disease occurred." INA Pet. App. A19. Rather, "bodily injury" takes place at or shortly after the initial inhalation of asbestos fibers and whenever asbestos fibers were subsequently inhaled, as the district court correctly found. INA Pet. A17. Coverage thus essentially exists whenever medical testimony establishes that "bodily injury" occurred in a particular case.

The factual findings by the district court which were concurred in by the Court of Appeals must be accepted by this Court unless clearly erroneous.[8] Moreover, it is apparent that these medical findings are not clearly erroneous because similar findings have been made by other courts.[9] These medical findings unequivocally support the opinion of the Sixth Circuit.

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[8] Neil v. Biggers, 409 U.S. 188, 193 n.3 (1972); Blau v. Lehman, 368 U.S. 403, 408-409 (1962); Faulkner v. Gibbs, 338 U.S. 267, 268 (1949); United States v. Dickinson, 331 U.S. 745, 751 (1947); United States v. Commercial Credit Co., 286 U.S. 63, 67 (1932).

[9] Similar medical findings were made by the Fifth Circuit in Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3023 (U.S. July 31, 1981)

4. The "injurious exposure" theory adopted by the Fifth and Sixth Circuits, based on the policy language and the medical testimony, is administratively workable. Petitioners' contentions to the contrary are both exaggerated and speculative.

First, Petitioners contend that there will be difficulty in allocating control of the defense among the various insurers. Liberty Pet. 20-21. However, such difficulty exists in any multiple insurer situation and is not unique to the asbestos cases. The mere prospect of multiple defendants or insurers provides no justification for review by this Court.

Second, Petitioner alleges that the defense counsel will have competing loyalties and therefore a conflict of interest. Liberty Pet. 21-22. The Court of Appeals correctly recognized that this is not "a significant problem in light of an attorney's duty to protect the interest of the insured." INA Pet. App. A32 n.25.

Third, Petitioners allege that disputes among insurers over apportionment may prevent settlements and result in increased litigation. This is mere speculation. Inasmuch as the apportionment formula adopted by the Sixth and Fifth Circuits involves solely a *pro rata* calculation based on the proportion of claimant's injurious exposure period which was within an insurer's policy period, the formula is administratively simple and does not necessarily result in further litigation.

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(No. 81-200) and Borel v. Fiberboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), and by the United States District Court for the District of Columbia in Keene Corporation v. Insurance Co. of North America, *supra*, 513 F. Supp. 47 (1981).

Fourth, Petitioner's allegations concerning difficulties in locating old policies which may have been destroyed are simply not unique to the asbestos cases and provide no basis for rejection of the "exposure theory". There are well developed substantive laws concerning proof of lost policies.

## THE SINGLE ISSUE AS TO WHICH THE WRIT SHOULD BE GRANTED

5. While *amicus* Hartford contends that the Court of Appeals was correct as a matter of state law in its adoption of the "injurious exposure" theory and that this interpretation of state law does not raise issues worthy of review by this Court, *amicus* Hartford agrees with Petitioner Liberty that the reversal of the burden of proof by the Sixth Circuit, in express contravention of state law, is worthy of review by the Court. This issue of the burden of proof requires review for two reasons.

First, it is apparent that the Sixth's Circuit determination to "simply reverse the ordinary burden of proof" is a blatant violation of its duty to apply state law on the substantive issue of burden of proof. INA Pet. App. 33A n.27. Indeed, the Sixth Circuit expressly recognized that state law was to the contrary and cited the leading Illinois and New Jersey cases. *Id.* Despite the well established state law, the Court of Appeals stated that "*we* simply reverse the ordinary burden of proof." *Id.* (emphasis supplied). The Court of Appeals did not even purport to apply state law, or to even analyze how a state court would apply the burden of proof in the context of asbestos-related claims. The action of the Sixth Circuit violated the constitutional command of this Court that

> State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' [*West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 237 (1940).]

Here the Court of Appeals expressly ascertained the state law and refused to apply it. This constitutional violation alone merits review and summary remand. *See* Rule 17.1(c), Sup. Ct. Rules.

However, the Sixth Circuit erred in reversing the burden of proof for a second reason also. The Sixth Circuit justified its unprecedented repudiation of state law on the basis of a purported factual finding of "the impossibility in most cases of ascertaining which company provided asbestos products in different years." *Id.* However, there was no evidentiary record on which such a finding could be based. The issue of reversing the burden of proof had never been presented to the district court. Nor could any of the evidence in the court below support such a finding. This purported factual finding was not only unsupported in the record, but may not even be true. The Court of Appeals, by making such a purported finding without any evidentiary basis whatsoever, "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 17.1(a), Sup. Ct. Rules.

Accordingly, the Court should grant review of this one issue concerning the burden of proof; vacate footnote 27 of the Court of Appeals' opinion; and remand to the Court of Appeals with instructions to hold an evidentiary hearing before the district court on the factual issues raised by footnote 27, and to consider whether the state courts of Illinois and New Jersey would reverse the burden of proof, if the issue were presented to them.

## CONCLUSION

For the foregoing reasons, the Petitions for a Writ of Certiorari should be denied insofar as they seek review of the insurance coverage issues, but should be granted insofar as they seek review of the Sixth Circuit's reversal of the burden of proof.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of September, 1981, three copies of the foregoing Motion for Leave to File Brief Amicus Curiae and Brief in Partial Opposition and Partial Support of Amicus Curiae Hartford Accident and Indemnity Company were mailed by first class mail, postage prepaid to:

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# APPENDIX

## APPENDIX "A"

### COMPANIES AFFILIATED WITH HARTFORD ACCIDENT & INDEMNITY COMPANY

The parent corporation of Hartford Accident & Indemnity Company is Hartford Fire Insurance Co., a subsidiary of International Telephone and Telegraph Corp. The following corporations are also subsidiaries of Hartford Fire Insurance Co.: Pacific Insurance Co., Ltd.; Sentinel Insurance Co., Ltd.; Hartford Casualty Co.; New York Underwriters Insurance Co.; Twin City Fire Insurance Co.; London Canada Insurance Co.; Hartford Life and Accident Insurance Co.; First State Insurance Co.; Great Eastern Insurance Co., Ltd.; and London and Edinburg General Insurance Co. of Canada.

# Amicus Brief

## 5

Nos. 81-198 and 81-199

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

MOTION FILED
NOV 16

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INSURANCE COMPANY OF NORTH AMERICA,
*Petitioner,*
v.
FORTY-EIGHT INSULATIONS, INC., and
TRAVELERS INDEMNITY OF RHODE ISLAND,
*Respondents.*

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LIBERTY MUTUAL INSURANCE COMPANY,
*Petitioner,*
v.
FORTY-EIGHT INSULATIONS, INC., and
TRAVELERS INDEMNITY OF RHODE ISLAND,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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# MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE FOR KEENE CORPORATION

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In The

# Supreme Court of the United States

October Term, 1981

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**81-198 and 81-199**

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Insurance Company of North America,
*Petitioner,*
v.
Forty-Eight Insulations, Inc., and
Travelers Indemnity of Rhode Island,
*Respondents.*

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Liberty Mutual Insurance Company,
*Petitioner,*
v.
Forty-Eight Insulations, Inc., and
Travelers Indemnity of Rhode Island,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE FOR KEENE CORPORATION

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Keene Corporation ("Keene") moves for leave to file the attached brief *amicus curiae* in opposition to the Petitions for Writ of Certiorari filed by Liberty Mutual Insurance Company ("Liberty Mutual") and the Insurance Company of North America ("INA").

Certain parties have refused consent to the filing of Keene's *amicus curiae* brief.

*Amicus* Keene prevailed in another insurance coverage dispute relating to asbestos cases. *Keene Corporation* v. *Insurance Company of North America*, Nos. 1179-82 (D.C. Cir., October 1, 1981), petitions for rehearing pending. Two of the insurance companies in this case, Liberty Mutual and INA, and one insurance company *amicus* here, Hartford Accident & Indemnity Company ("Hartford"), are defendants in the *Keene* case.

In the *Keene* case, the United States Court of Appeals for the District of Columbia Circuit rejected the Hobson's choice Insurance Industry theories of manifestation coverage or pro-rata exposure coverage. Instead, the District of Columbia Circuit held that the standard comprehensive general liability insurance policies provide coverage for Keene's legal liability. The court further held that the policies are triggered by injury and that continuing injury during successive insurance policy years, including the injury occurring with inhalation, subsequent to inhalation (*i.e.*, exposure in residence) and at manifestation of injury, triggers the full coverage of the standard comprehensive general liability policies without requiring any payment by the policyholder for indemnity or defense costs.

*Amicus* Keene seeks leave to file the attached brief to urge that (1) *certiorari* be denied in view of the inadequate record in this case which did not include much of the evidence that supports the decision in *Keene;* and (2) the position of Liberty Mutual and INA with respect to the burden of proof is incorrect and, in any event, does not justify *certiorari.*

## CONCLUSION

Keene's proposed *amicus* brief presents an important, new perspective on the issues before this Court other than that presented by the Insurance Industry. Hence, Keene respectfully requests that this motion for leave to file the attached brief *amicus curiae* be granted.

Respectfully submitted,

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INSURANCE COMPANY OF NORTH AMERICA,
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v.
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LIBERTY MUTUAL INSURANCE COMPANY,
*Petitioner,*
v.
FORTY-EIGHT INSULATIONS, INC., and
TRAVELERS INDEMNITY OF RHODE ISLAND,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

# BRIEF OF AMICUS CURIAE KEENE CORPORATION IN OPPOSITION TO PETITIONS

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## INTEREST OF THE AMICUS CURIAE

*Amicus Curiae* Keene Corporation ("Keene") prevailed in *Keene Corporation* v. *Insurance Company of North America, et al.*, Nos. 80-1179-82 (D.C. Cir., October 1, 1981), an insurance coverage dispute relating to Keene's asbestos cases. Keene has been a defendant in more than 10,000 such asbestos cases.

The standard comprehensive general liability insurance policies in *Forty-Eight* and *Keene* provide coverage for the policyholder's legal liability. The standard policy language was prepared by the Insurance Industry. While the Insurance Industry language is uniform and the policies are "standard," there is nothing uniform or standard in the interpretations of the identical standard policy language being urged upon this Court by the different insurance companies.

The standard comprehensive general liability insurance policies are, as Keene urged and as the District of Columbia Circuit held, insurance against legal liability. As noted by the District of Columbia Circuit in *Keene*, the uniform insuring clause of the standard comprehensive general liability policies sold by the insurance companies to Keene clearly provides:

> [t]he [insurance] company will pay on behalf of the *insured* [policyholder] all sums which the *insured* shall become legally obligated to pay as *damages* because of *bodily injury* . . . to which this insurance applies, caused by an *occurrence*, and the company shall have the right and duty to defend any suit against the *insured* [policyholder] seeking *damages* on account of such *bodily injury* . . . even if any of the allegations of the suit are groundless, false or fraudulent . . . .

Slip op. at 6.

Keene, based on the vastly different factual record in its case, has obtained full coverage for its legal liability.

## SUMMARY OF ARGUMENT

The facts in the *Keene* record fully support Keene's position, which was adopted by the District of Columbia Circuit, that the standard comprehensive general liability insurance policies provide coverage for Keene's legal liability. The Insurance Industry has created a specious controversy which it has defined in terms of "pro rata exposure" versus "manifestation" in order to describe the Insurance Industry's conflicting theories of insurance coverage. Keene realized, after it had conducted extensive discovery, that the "pro rata exposure" and "manifestation" concepts were Hobson's choices for policyholders created by the Insurance Industry to avoid financial responsibility to their policyholders.

In *Keene* v. *INA*, the District of Columbia Circuit properly rejected the Insurance Industry's coverage choices and held that injury, including continuing injury, during successive insurance policy years triggers the full coverage of those policies without requiring any payment by the policyholder for indemnity or defense costs. Based upon the unanimous testimony of the medical experts, the *Keene* court concluded that injury occurs with exposure, subsequent to exposure (*i.e.*, "in residence") and at manifestation.

The earlier *Forty-Eight* case was commenced by INA in 1977 soon after it switched its coverage position to a manifestation position (*Forty-Eight*, 451 F. Supp. 1230, 1239). The *Forty-Eight* case was tried on a sparse factual record and INA sought to rush the case to judgment realizing that a small company like Forty-Eight did not have the resources to combat INA's legal firepower.[1]

Following the District Court decision in *Forty-Eight*, Keene discovered massive Insurance Industry documentation that had not been produced in the *Forty-Eight* case. Keene also discovered that the chief witness for INA in *Forty-Eight* had later admitted that his testimony in *Forty-Eight* regarding INA's interpretation of the policy language was not correct. In *Forty-Eight*, INA neglected to produce any documents, which Forty-

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[1] INA did not sue any of its more financially-able policyholders such as GAF Corp., Keene, Armstrong Cork Co. or Fibreboard Corp.

Eight had requested, of an important Insurance Industry meeting in New York in 1977 at which the majority of insurance companies present agreed that their obligations were triggered by injury at any time from first inhalation until manifestation without proration to the policyholder for uninsured years. See discussion *infra* at 5-6. The District of Columbia Circuit in *Keene* adopted this *ante litem motem* position of the Insurance Industry.

The evidence developed in *Keene* is particularly pertinent since it demonstrates the intent of the draftsmen of the insurance policy language, the manner in which the Insurance Industry interpreted the policy language and the manner in which the Insurance Industry conducted itself pursuant to such interpretations.[2]

The intent of the insurance policy draftsmen and the interpretations and conduct of the Insurance Industry, as developed in *Keene*, directly support the holding of the *Keene* decision that the standard insurance policy language shifts all legal liability under any theory of liability from policyholders such as Keene and Forty-Eight to their insurance companies. This evidence also confirms the District of Columbia Circuit's holding that the policies are triggered by injury and that the policies do not provide for proration of damages or defense costs to the policyholder.

Furthermore, the grounds asserted by Liberty Mutual and INA do not warrant *certiorari*. Liberty Mutual and INA are attempting to elevate footnote 27 of the Sixth Circuit opinion to an *Erie* question by claiming that the Sixth Circuit failed to apply state law in a diversity case. That collateral issue does not warrant *certiorari* and, in any event, was correctly decided as a matter of state law which traditionally has imposed an obligation on insurance companies to establish the basis for denying coverage by investigating third-party claims against their policyholders before denying coverage.[3]

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[2] In fact, the evidence in *Keene* shows that INA's switch to a manifestation position was largely attributable to economic considerations. For example, under a manifestation approach, INA reduces its liability from approximately $489 million down to practically no liability. *See* Joint Appendix in *Keene* v. *INA*, Volume V at 1666-1667.

## ARGUMENT

### A. *Certiorari* Should Be Denied In View Of The Inadequate Record In This Case

The *Forty-Eight* case was decided without the substantial factual record later developed in *Keene*. The *Keene* record confirms the correctness of the *Keene* decision that (1) the standard comprehensive general liability insurance policies provide coverage for the policyholder's legal liability; and (2) injury, including continuous injury, triggers coverage under successive insurance policy years without any proration of damages or defense costs to the policyholder.

With respect to the "legal liability" coverage provided by the insurance policies at issue, the District of Columbia Circuit held: "Once triggered, each policy covers Keene's liability." Slip op. at 27. The *Keene* holding is simply a restatement of the insuring clause of the standard comprehensive general liability insurance policies which "provide[s] that the insurance company will pay on behalf of Keene 'all sums' that Keene becomes legally obligated to pay as damages because of bodily injury during the policy period." Slip op. at 24.

Furthermore, the record in *Keene* demonstrates that the Insurance Industry acknowledged in a 1977 meeting[4] the "all sums" legal liability interpretation advocated by Keene:

> The majority view was that the coverage existed for each carrier thoughout [sic] the period of time the asbestosis condition developed, i.e., from the first

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[3] Keene agrees with the statement of *amici* American Home Insurance, *et al.*, at page 3 of their brief, that a decision on the merits by this Court will not affect the large number of underlying asbestos lawsuits filed throughout the country.

[4] Representatives of INA, Liberty Mutual, Hartford, and Aetna were in attendance at this meeting.

> exposure through the discovery and diagnosis. The majority also contended that each carrier on risk during any part of that period could be fully responsible for the cost of defense and loss. The majority relied on *Borel* v. *Fibreboard Paper Products Corporation,* 493 F.2d 1076, U.S. Court of Appeals, Fifth Circuit (applying Texas law).

American Insurance Association and American Mutual Insurance Alliance Memorandum, dated May 20, 1977 (*Keene* J.A. III at 987).[5]

The court in *Keene* also held that the insurance policies cover the policyholder's legal liability in full without proration of any damages or defense costs to the policyholder. The court stated: "As we interpret the policies, they cover Keene's *entire* liability once they are triggered" (slip op. at 27, emphasis added); and "Because we hold that each insurer is fully liable to Keene for indemnification, it follows that each is fully liable for defense costs" (slip op. at 32).

The impermissibility of prorating expenses to the policyholder has been recognized by the insurance companies, as demonstrated by numerous examples in the *Keene* record. In 1964, the Insurance Industry draftsmen of the standard policy language explained:

> [P]rorating cannot be effectuated between the insurer and the claimant. Between two insurers, of course, they would prorate.

Minutes of September 21-23, 1964 Joint Forms Committee of Mutual Insurance Rating Bureau (*Keene* J.A. V at 1807).

INA expressed the same concept in 1975:

> In the situations where there was no carrier in the earlier years, or the carrier cannot be identified, the insured should not be asked to contribute out of their [sic] own pocket. . . . [T]he fact of not requiring the

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[5] Throughout this brief, citations for quotations from documents in the *Keene* case are to the Joint Appendix in *Keene* v. *INA*.

> insured to contribute is no different than [sic] any case that is settled for [sic] trial where there has been an exposure which is partly uninsured. By exercising its prerogative to settle, the carrier has foregone the opportunity to have the issues of liability and damages adjudicated.

INA Memorandum, dated 8/8/75 (*Keene* J.A. VIII at 3183). Recently, the general counsel for *amicus* Hartford concurred in a sworn statement in a New York federal court:

> No serious argument can be made in favor of prorating coverage for multitudes of individual claimants over 10 to 20 years.

Affidavit and Attached Memorandum, dated July 1, 1980, of Richard A. Schmalz at 8 (filed in *Schering Corp.* v. *The Home Insurance Co.*, No. 79-C-2817 (E.D.N.Y.), and referenced in Keene's Reply Brief in *Keene* v. *INA* at 9).

With respect to the trigger of coverage under the standard comprehensive general liability insurance policies, the court in *Keene* recognized that "the question is when did 'injury' occur?" Slip op. at 13. Based upon a detailed analysis of the issue, the court decided that asbestos-related injury is a continuing process and thus successive insurance policies are triggered:

> We conclude, therefore, that inhalation exposure, exposure in residence, and manifestation all trigger coverage under the policies. We interpret 'bodily injury' to mean any part of the single injurious process that asbestos-related diseases entail.

Slip op. at 23.

The *Keene* record confirms that the District of Columbia Circuit adopted the correct trigger of coverage. Liberty Mutual wrote in 1965, for example, with respect to the injury trigger of coverage:

> This means that the policy in force when a particular injury or damage takes place is the one which applies, regardless of when the causing accident took

> place. So if the injury or damage from waste disposal should continue after the waste disposal ceased, as it usually does, it could produce losses on each side of a renewal date, and in fact over a period of years, with a separate policy applying each year.

Liberty Mutual Presentation at Mutual Insurance Technical Conference, November 15-18, 1965 (*Keene* J.A. IV at 1592). The Insurance Industry agreed in 1978 that injury, regardless of when causation or manifestation occurs, is the trigger of coverage:

> Presently the standard general liability policies provide coverage for injury which occurs during the policy period, regardless of when the exposure to harmful condition [sic] takes place, or when injury become [sic] known or manifest.

Minutes of March 28, 1978 Meeting of General Liability Rules and Forms Committee of Insurance Services Office (*Keene* J.A. V. at 1841).

The court in *Keene* correctly recognized that coverage could not be triggered by manifestation alone, as urged by INA, Liberty Mutual and Aetna Casualty and Surety Company ("Aetna"): "To accept the argument that *only* manifestation triggers coverage . . . would deprive Keene of the protection it purchased when it entered into the insurance contracts." Slip op. at 22. In fact, it is clear from the record in *Keene* that the Insurance Industry rejected the manifestation approach urged by the petitioners here. One of the draftsmen of the insurance policies who was affiliated with Aetna stated in a 1966 letter:

> It is surprising to me to hear of a current reference to the requirement that injury or damage must become manifested during the policy term in order to fit the definition of 'occurrence' under the new policies. Terminology such as this had actually been used in some previous drafts of our new policy but the final definition of occurrence speaks in terms of 'an accident, including injurious exposure to conditions,

> which results, during the policy period in bodily injury or property damage...'

*Keene* J.A. IV at 1600. Hartford's general counsel also confirmed that the manifestation approach "was carefully studied by the [insurance] industry in 1961 and rejected . . . ." *Keene* J.A. IV at 1552.

The evidence in *Keene* also shows that the only Insurance Industry witness who testified in the *Forty-Eight* case, later in the *Keene* case recanted material aspects of his testimony in *Forty-Eight*. INA witness, James McMahon, testified in *Forty-Eight* that manifestation was the "traditional rule" at INA and that no one at INA disagreed. In his deposition in *Keene* v. *INA*, Mr. McMahon directly contradicted his earlier testimony. He could not recall a single asbestos case handled by INA on a manifestation basis before 1977 and he testified that INA, in fact, handled asbestos cases on an exposure basis. The testimony in *Keene* v. *INA* shows that Mr. McMahon's chief lieutenant disagreed with a manifestation approach.

Finally, at a later date in still another coverage case, Mr. McMahon flatly admitted that his testimony in *Forty-Eight* was not correct and agreed that he probably had an obligation to bring such inaccuracies to the attention of the *Forty-Eight* District Court. *GAF Corp.* v. *Insurance Company of North America, et al.*, Case No. C-286217, Superior Court, Los Angeles County, Los Angeles, California. This was never done.

There are further factual differences between *Keene* and *Forty-Eight* (as well as *Porter* v. *American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3024 (U.S., July 31, 1981) ). The important factual differences among *Keene*, *Forty-Eight* and *Porter* are:

> 1. In *Forty-Eight*, the issue of prorating damages to the policyholder was not before the Court. The policyholder there, unlike Keene, accepted proration, undoubtedly because its counsel did not have available the documentation showing the rejection of the proration concept by the Insurance Industry.

2. In *Porter*, prorating indemnity or defense expenses to the policyholder was not an issue since *Porter* was a dispute solely among insurance companies as to the trigger of coverage.

3. In *Forty-Eight* and *Porter* the parties urged the two extreme Insurance Industry triggers of coverage—inhalation (*i.e.*, exposure) versus manifestation. The proper trigger of coverage, injury including continuing injury, was not addressed by the parties or the courts.

4. The *Keene* record precisely demonstrated that asbestos-related injury occurs at the time of and subsequent to inhalation. The *Forty-Eight* decision assumed that the period of exposure and injury were coextensive and did not address the issue of continuing injury subsequent to inhalation.

5. *Porter* did not even involve the purported issue of reversal of the burden of proof which has been alleged as a ground for *certiorari* in the *Forty-Eight* case.

6. The results in *Forty-Eight*, *Porter* and *Keene* reflect each Court's view of the factual record in the case before it and each Court construed the ambiguities against the Insurance Industry.[6]

## B. *Certiorari* Should Be Denied Because The *Forty-Eight* Holding Concerning Burden Of Proof Is Correct

The Court in *Forty-Eight* properly stated the rule that a comprehensive general liability insurance policy requires the insurance company to investigate the facts and establish the basis for denying coverage of a third-party claim against its policyholder before it can deny coverage of that claim. There clearly is no requirement that the policyholder first prove that the allegations against it are in fact true. To require the policyholder to do so would deprive it of an essential element of the insurance coverage it purchased —the defense of the claims against it.

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[6] In the event this Court decides to grant *certiorari*, Keene suggests that *certiorari* be deferred until *Keene* is ripe for review.

The New York Court of Appeals, finding that general liability insurance policies provide "litigation insurance", held in *International Paper Co.* v. *Continental Casualty Co.*, 35 N.Y.2d 322, 325, 361 N.Y.S.2d 873, 875, 320 N.E.2d 619, 621 (1974):

> An insured's right to be accorded legal representation is a contractual right and consideration upon which his premium is in part predicated, and this right exists even if debatable theories are alleged in the pleading against the insured.

Furthermore, even if the complaint on its face does not state a claim within the coverage of the policy, the insurance company has a duty to investigate and establish the actual facts of the claim against the policyholder before denying coverage under its policy. One court has described this practice as "commonplace." *American States Insurance Co.* v. *Aetna Life & Casualty Co.*, 379 N.E.2d 510, 518 (Ind. App. 1978). *Accord, American Motorists Insurance Co.* v. *Southwestern Greyhound Lines, Inc.*, 283 F.2d 648, 649 (10th Cir. 1960); *Fresno Economy Import Cars, Inc.* v. *United States Fidelity & Guaranty Co.*, 76 Cal.App.3d 272, 278-279, 142 Cal.Rptr. 681, 685 (1977); *Clark* v. *Fidelity and Casualty Co. of New York*, 285 N.Y.S.2d 503, 521, 55 Misc.2d 327 (Sup. Ct. 1967).

Once an insurance company undertakes the defense of an action against its policyholder, the counsel it hires to defend the policyholder is responsible, as part of the litigation of the action, for developing the facts. The policyholder has no duty to prove when the claimant's bodily injury occurred.

The "burden of proof" cases cited by petitioner Liberty Mutual clearly are inapposite. None of these cases involve the defense of *third-party claims* against the policyholder under comprehensive general liability insurance policies. Instead, the cases involve the coverage of *first-party claims* made by the policyholder itself (or another first-party claimant, such as the policyholder's beneficiary) *directly against the insurance company* under some type of casualty, health or life insurance policy. Obviously, a different standard for proof of coverage is employed in these contexts where the claim is being made directly by the policyholder in a first-party context rather than a third-party claim against the policyholder.

The *Forty-Eight* decision's holding with respect to the burden of proof does not not constitute the basis for granting a writ of *certiorari* because it is reasonable and consistent with the clear weight of the law as illustrated by the cases discussed above.[7]

## CONCLUSION

For the foregoing reasons, *amicus* Keene suggests that *certiorari* be denied.

Respectfully submitted,

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[7] In an analogous context in *Sindell* v. *Abbott Laboratories*, 26 Cal.3d 588, 607 P.2d 924, 163 Cal.Rptr. 132, *cert. denied*, 449 U.S. 912 (1980), the petitioners argued that the court below had reversed the ordinary burden of proof but this Court recently denied *certiorari*.

# Amicus Brief

## 6

MOTION FILED
AUG 31 1981

Nos. 81-198 and 81-199

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

INSURANCE COMPANY OF NORTH AMERICA,
*Petitioner,*
v.
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*Respondent.*

LIBERTY MUTUAL INSURANCE COMPANY,
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v.
FORTY-EIGHT INSULATIONS, INC.
AND
TRAVELERS INDEMNITY OF RHODE ISLAND,
*Respondents.*

On Petitions For Writs Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

# MOTION OF WALBROOK INSURANCE COMPANY, LTD., ET AL., FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE*

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On Petitions For Writs Of Certiorari
To The United States Court of Appeals
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# MOTION OF WALBROOK INSURANCE COMPANY, LTD., ET AL., FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

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Pursuant to Rule 36.1 of this Court's rules, the following insurance companies in the London insurance market and underwriters at Lloyd's, London, move for leave to file a brief *amici curiae*, bound herewith, in support of the petitioners: Walbrook Insurance Company, Ltd., Southern American Insurance Company, Mutual Re-Insurance, Ltd., St. Catherine Insurance Company, Ltd., London and Edinburgh General Insurance Company, Ltd., Dominion Insurance Company, Ltd., Yasuda Fire and Marine Insurance Company (U.K.), Ltd., Bellefonte Insurance Company, Mentor Insurance Company (U.K.), Ltd., Assicurazioni Generali London, Stronghold Insurance Company, Ltd., National Casualty Company of America, Ltd., Accident and Casualty Insurance Company, Argonaut Northwest Insurance Company, Slater, Walker Insurance Company, Ltd., and John Basil Thomas Bird as a representative underwriter representing certain underwriters at Lloyd's, London.

All of the foregoing companies and underwriters support the manifestation interpretation of coverage under the policies of insurance here at issue.* While *amici* have received the consent of certain of the parties to filing the attached brief, the respondent Forty-Eight Insulations, Inc., has declined to consent.

As further detailed in the Statement of Interest in the attached brief, the London Market has provided excess insurance coverage for numerous manufacturers of asbestos-containing products, and continues to offer such coverage. Principles of interpretation governing primary, first-layer insurance policies will directly affect the point at which primary coverage may be exhausted, and hence the point at which claims may be made on the excess coverages. The London Market also provides excess insurance for a wide variety of other products liability claims. The amount of such insurance, although not precisely quantifiable, is certainly measured in hundreds of millions of dollars. In the conduct of its business, and especially given its unique position in the provision of excess insurance coverage, the London Market necessarily relies on the prospect of a consistent application of settled principles of contract interpretation and choice of law. The Court of Appeals decision, however, effects a profound alteration in those settled principles. The result of the court's decision may be a vast, unbargained for liability upon insurers at the excess levels. This result flows, *amici* believe, from a misperception by the Court of Appeals of the proper role of a federal court exercising diversity jurisdiction.

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* Other underwriters and companies in London espouse the exposure theory; all underwriters and companies in London are hereafter sometimes referred to together, despite their differences in interpretation, as "the London Market."

Therefore, for the reasons set forth in this motion and in the Statement of Interest in their brief, the manifestation underwriters and companies in the London Market respectfully request that this motion to file the attached brief be granted.

August 28, 1981

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Underwriters in the London Market

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On Petitions For Writs Of Certiorari
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For The Sixth Circuit

## BRIEF OF *AMICI CURIAE*

## INTEREST OF THE *AMICI CURIAE*

Underwriters and companies in the London insurance market have for many years provided various insureds in the United States with excess or umbrella insurance coverage for products liability claims. Coverage has been, and continues to be, afforded by the London Market for asbestos-related products liability claims. *Amici curiae* are those underwriters at Lloyd's, London, and companies in the London insurance market who have provided or now provide such coverage, and who support a manifestation interpretation of the policy language at issue here. *Amici* are vitally interested in the Court of Appeals decision in this case, and the method by which it was reached, for several distinct but related reasons.

First, the language in *amici's* excess policies is similar to the policy language contained in the primary policies at issue. The *amici* believe that courts will properly be reluctant to interpret excess policies in a way inconsistent with an interpretation previously given to substantially the same language in primary policies. Moreover, the ramifications of the exposure/manifestation choice are not confined to litigation with respect to asbestos-related claims. Because the language at issue is standard and has been customarily used, with minor variations, in insurance policies at all levels, principles governing the interpretation of that language in the asbestos context may also reverberate through other disease claims involving long-term exposure, establishing rules of continued importance even after the asbestos matters have been resolved.

Second, this Court can observe from the alignment of the parties in this proceeding that the manifestation/exposure dispute has split the American insurance industry. In the same way, the dispute has split the London Market. This state of affairs is obviously undesirable from an insured's point of view and, for that very reason, is also undesirable from the point of view of those who wish to provide insurance coverage.

Third, from the particular perspective of the London Market, which provides excess insurance throughout the United States and internationally, it is highly important that settled rules of decision, both in contract interpretation and in choice of law, be observed. The Court of Appeals decision in the instant case, however, has profoundly altered those rules in a way which will, inevitably, affect the writing of insurance in London for the American market. Quite simply, if risk analysis, which is the basis for quoting premiums, must consider not only the decisional law of the several states, and the trends in that law discernible from state judicial pronouncements and legislative enactments, but also the possibility that federal courts will now be free to articulate and apply hitherto unannounced state policies, then premiums must be quoted and contracts drawn which will reflect this new element of judicial risk. The possibility that state law will change is, of course, inherent in any contract of insurance, but heretofore changes in state law for policy reasons have been thought the prerogative of state courts. *Amici*, having provided many millions of dollars of insurance coverage on this basis, have a substantial interest in preserving previously existing rules of decision.

## SUMMARY OF ARGUMENT

The problems created by the asbestos lawsuits — the number of claims, the amounts at issue, and the consequences for the claimants, the manufacturers, the insurers, and the courts — are unquestionably of sufficient national concern to attract this Court's attention. Moreover, if petitioners are correct, as *amici* believe they are, and the Court of Appeals has promulgated a rule of federal common law in this diversity proceeding, then that error is sufficiently grave to warrant correction by this Court. *Amici* urge upon this Court, in addition, these further reasons for granting the writ.

First, the general approach by which a federal court should ascertain state law is itself governed by federal law and subject to the general supervision of this Court. Indeed, this Court has articulated the proper method for use in diversity cases. In the instant case, however, the Court of Appeals employed an approach to state law — *i.e.*, the assumption that state courts would permit general considerations of state policy to override specific precedents — which has never been sanctioned by this Court. Federal creation of state policy as a means of avoiding state decisional law is a method of decision which will be equally applicable, and equally pernicious, in every diversity case. The result is an erosion of the principles of *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938). Moreover, the collateral consequences of this particular mistaken approach to state law will be an enormous additional burden on the federal judicial system. *See* pp. 5-8, *infra*.

Second, recognizing that, even under the former version of this Court's rules, certiorari was rarely granted when "an important state . . . question [was decided] in a way in conflict with applicable state law," and that the quoted language is now omitted altogether from this Court's new rules, *amici* nonetheless suggest that this Court should in certain rare instances exercise its supervisory power to correct federal misapplications of state law. The present case is such an instance. So long as *Erie* continues as the definitive interpretation of the Rules of Decision Act, Judiciary Act of 1789, §34, 28 U.S.C. §1652, it requires more than a formal nod in the states' direction. When the error is serious enough, the consequences sufficiently widespread, and the mistaken principles of interpretation capable of infecting other diversity cases, certiorari should be granted. *See* p. 9, *infra*.

Third, to the extent the Court of Appeals was correct in saying that it confronted "a novel and important question of insurance law," that question was one of state law. The Court of Appeals chose to resolve the question in a way contrary to state precedent but, it believed, consistent with some higher state policy. The decisions of this Court establish, however, that, if the issue were really novel and undecided, and the subject matter of compelling concern to the states, then the appropriate course would have been for the federal court to abstain so that the parties could present the novel issue of state law to the state courts. *See* pp. 9-14, *infra*.

## ARGUMENT

### I. THE COURT OF APPEALS APPLIED INCORRECT PRINCIPLES TO THE DETERMINATION OF STATE LAW.

In a diversity action, the method by which a federal court ascertains state law is, of course, a federal matter, subject to supervision by this Court. *See, e.g., Fidelity Union Trust Co.* v. *Field,* 311 U.S. 169, 177-80 (1940) (Hughes, C. J.).[1] The correct approach to the ascertainment of Illinois and New Jersey law — which ought to have been followed by the court here — was established first by *Field* and other cases decided during the same Term, *see Six Companies* v. *Joint Highway District No. 13,* 311 U.S. 180 (1940); *West* v. *American Telephone & Telegraph Co.,* 311 U.S. 223 (1940); *Stoner* v. *New York Life Insurance Co.,* 311 U.S. 464 (1940); *Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U.S. 538 (1941), and is summarized in *Bernhardt* v. *Polygraphic Co.,* 350 U.S. 198, 203-05 (1956). Sitting in diversity, a federal court is "in substance 'only another court of the State.'" 350 U.S. at 203, *quoting Guaranty Trust Co.* v. *York,* 326 U.S. 99, 108 (1945). The sources of law to which a federal court should look in fulfilling this role are likewise established by this Court's decisions. Quite simply,

> "[T]he State's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court." *Commissioner* v. *Estate of Bosch,* 387 U.S. 456, 465 (1967).

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[1] The principles governing ascertainment of state law must be distinguished from the mechanics by which such law is determined. As to the latter, this Court has never thought it necessary or appropriate to offer instruction. *See, e.g., Lehman Bros.* v. *Schein,* 416 U. S. 386, 394 (1974) (Rehnquist, J., concurring). As to the former, this Court continues to cite the line of cases relied on in text. *See, e.g., Vance* v. *Universal Amusement Co.,* 445 U.S. 308, 316 n.14 (1980); *Wolston* v. *Reader's Digest Ass'n, Inc.,* 443 U.S. 157, 160-61 n.2 (1979).

These principles are of particular importance in the present situation where, obviously, the Court of Appeals for the Sixth Circuit could claim no special familiarity, by way of local knowledge, with the law of the New Jersey or Illinois.

The Court of Appeals acknowledged the existence of both New Jersey and Illinois cases in analogous areas, and recognized that these cases reached results contrary to the court's own view. *See* App. 18a nn.15 & 17, 20a n.18[2]; 633 F.2d at 1221 nn.15 & 17, 1222 n.18. The court chose to disregard these decisions, but not for any of the reasons hitherto thought permissible by this Court. Those reasons are set forth in *Bernhardt:*

> ". . . confusion in the [state] decisions, . . . developing line of authorities that casts a shadow over the established ones, . . . dicta, doubts or ambiguities in the opinions of [state] judges on the question, . . . legislative development that promises to undermine the judicial rule." *Bernhardt* v. *Polygraphic Co.,* 350 U.S. 198, 205 (1956).

The Court of Appeals could point to none of these things, nor, indeed, to any evidence of change in the manifestation views of Illinois and New Jersey.[3] Instead, it put to one

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[2] Appendix references are to the appendix to Liberty Mutual's petition, No. 81-199.

[3] The Court of Appeals adopted the district court's general discussion of Illinois and New Jersey law. App. 15a; 633 F.2d at 1219-20. A catalogue of general principles of insurance law, however, is no substitute for an analysis of precedents more directly applicable to the issues in the case. In fact, the determining principle for the Court of Appeals seems to have been that "we are bound to broadly construe the insurance policies to promote coverage." App. 14a-15a; 633 F.2d at 1219. The quoted language considerably overstates the law of Illinois and New Jersey and, in any event, cannot replace analysis of the state cases defining "disease."

Insofar as the Court of Appeals decision rests on the District Court's view that liability on insurance contracts should parallel liability to the tort claimants themselves under the principles of *Borel* v *Fibreboard Paper Prods. Corp.,* 493 F.2d 1076 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974), there appears to have been a complete failure to analyze state law. Even if *Borel* stated the apside the holdings and reasoning of pertinent authority in both jurisdictions and relied, insofar as the law was concerned, on "policy considerations." App. 16a; 633 F.2d at 1220. The Court of Appeals, in brief, reduced the insurance law of Illinois and New Jersey to the simple, amorphous proposition that all insurance contracts must be construed to maximize coverage. In so doing, the court established its own notions of state policy, as if it were a state court writing on a clean slate, rather than a federal court bound to apply the law already established by the state courts' decisions.[4]

This new approach for the ascertainment of state law in diversity cases is in derogation of the fundamental teaching of *Erie*. It rests, as the United States District Court for the District of Massachusetts noted in declining to follow *Forty-Eight*, "primarily on considerations of policy and result." *Eagle-Picher Industries, Inc.* v. *Liberty Mutual Insurance Co.*, No. 78-2739-Z, slip op. at 14 n.9 (D. Mass. Aug. 14, 1981) (Zobel, J.). Considerations of "policy and result," however, should not be accepted by this Court as a basis for disregarding settled state law; such an approach throws into chaos the entire process for ascertain-

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plicable law in Illinois and New Jersey, which it does not purport to do, and even if Illinois and New Jersey law covered the underlying tort claims, which may or may not be the case, there still is no indication whatever that the law of Illinois and New Jersey would import tort principles into the area of insurance contract interpretation.

[4] Indeed, if there is a trend of development in state law, it is in exactly the opposite direction to that taken by the Court of Appeals. Shortly after that court published its opinion on rehearing, a decision of the Illinois Supreme Court was reported confirming the discovery — not exposure — approach to the statute of limitations in Illinois. *Nolan* v. *Johns-Manville Asbestos*, 85 Ill. 2d 161, 421 N.E.2d 864 (1981), *reported first in* 49 U.S.L.W. 2568 (March 10, 1981). Such a development in state law, if thought of as new, would itself be a sufficient basis to vacate and remand the decision of the Court of Appeals. *See Vandenbark* v. *Owens-Illinois Glass Co., supra*, 541-43 (1941).

ing state law in diversity proceedings. It permits federal courts to return, under the guise of implementing state "policy," to the pre-*Erie* days of different substantive law in federal and state courts.

Indeed, the *Forty-Eight* decision has already had this effect. Some other federal courts have applied *Forty-Eight* unquestioningly, even though those cases should have been decided under the controlling law of other states. *See, e.g., Porter* v. *American Optical Corp.*, 641 F.2d 1128, 1145 (5th Cir. 1981) (following *Forty-Eight,* despite the admission that Louisiana law controls), *petition for cert. filed,* 50 U.S.L.W. 3024 (Aug. 11, 1981) (No. 81-200); *Keene Corp.* v. *Insurance Co. of North America,* 513 F. Supp. 47 (D.D.C. 1981) (following *Forty-Eight,* without any discussion of what law governs), *appeal docketed,* No. 81-1180 (D.C. Cir. 1981). These courts have simply adopted *Forty-Eight's* policy analysis without any consideration of the governing state law, which they should have been applying.[5]

Nor is it an adequate response to the federal concerns raised by the Court of Appeals decision that, eventually, the issue may come before the highest courts of Illinois and New Jersey. While those courts can indeed correct misapplications of the substantive law of their states, they cannot correct the Court of Appeals' errors of method. Only this Court can do that. Moreover, such state court decisions will come too late, not only for the present parties, but for the heavily overburdened federal judicial system.

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[5] More recent decisions have not found *Forty-Eight* persuasive. *See Eagle-Picher Indus., Inc.* v. *Liberty Mutual Ins. Co., supra,* at 13-14 (manifestation result under law of Illinois, Ohio, and England); *Ryden* v. *Johns-Manville Prods.,* No. 77-644, and related cases (W.D. Pa. July 17, 1981) (manifestation result under Pennsylvania workmen's compensation and case law). The *Eagle-Picher* case is noteworthy for its incisive discussion of the medical evidence and policy language.

## II. THIS IS THE RARE CASE IN WHICH THIS COURT SHOULD CORRECT AN ERROR OF STATE LAW IN ORDER TO ASSURE THE CONTINUED VITALITY OF *Erie*.

The continued vitality of *Erie* requires supervision by this Court in the unique circumstances presented by this case. Here, the Sixth Circuit purported to resolve issues of substantial local concern, involving the policies and precedents of Illinois and New Jersey. The Court of Appeals has no special familiarity with the law of either state, neither being in that circuit. The court resolved the issues before it using the wrong approach to state law and reaching a wrong result in conflict with state precedent. In doing so, it has created serious problems for the orderly administration of justice in the federal system, given the unprecedented situation created by the number and seriousness of asbestos-related lawsuits around the country. In this situation, more is involved than correction of particular state law errors. The present case affords the Court an opportunity to demonstrate, on the one hand, that the obligations of *Erie* cannot be avoided by a formalistic bow in the direction of state law, while, on the other hand, illustrating specifically the extremely limited circumstances under which this Court will grant petitions in this area.

## III. RATHER THAN DECIDE AN IMPORTANT STATE LAW ISSUE IN A NOVEL WAY, THE COURT OF APPEALS SHOULD HAVE ABSTAINED FROM EXERCISING JURISDICTION.

In most instances, a federal court exercising diversity jurisdiction is required to adjudicate questions of state law brought before it; the court may not abstain. *Meredith* v. *Winter Haven*, 320 U.S. 228 (1943). Had the Court of Appeals in *Forty-Eight* been content to apply the settled insurance law of Illinois and New Jersey, there would have been no occasion for abstention. In order to reach its exposure result, however, the Court of Appeals had to distinguish precedent and proceed on general policy considerations. While *amici* believe the court's analysis of those general policy considerations was quite wrong, *amici* also suggest that, under this Court's decisions, if the Court of Appeals found itself in uncharted areas of state policy, it should then have decided to abstain, and remit the matter to the states.[6]

This Court has held that a federal court should abstain from decision "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 814 (1976). Abstention is also preferred where a state has demonstrated a considerable regulatory concern for the subject matter under review and a federal decision in an individual case may have a disruptive effect on those state policies, *see, e.g., Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943) (oil and gas regulation); or where claims involve difficult questions of state law, *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25 (1959) (interpretation of state's eminent domain law); or issues of particularly local concern, *Kaiser Steel Corp.* v. *W. S. Ranch Co.*, 391 U.S. 593 (1968) (private contest over water rights); or novel questions of common law which are unsettled under state law,

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[6] Abstention was not raised by the parties below nor considered by the District Court or the Court of Appeals. However, "it would appear that abstention may be raised by the court *sua sponte*." *Bellotti* v. *Baird*, 428 U.S. 132, 144 n.10 (1976). *See also Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496, 500-01 (1941). The failure of the parties to request abstention is one consideration, *inter alia*, to be taken into account, *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329 (1964), but it is not determinative. *See, e.g., Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971) ("The fact that Wisconsin does not raise the point does not, of course, mean that it lacks merit."); *Propper* v. *Clark*, 337 U.S. 472, 489-90 (1949).

*Lehman Brothers* v. *Schein*, 416 U.S. 386 (1974) (fiduciary duty of corporate insider).

These authorities establish an important rule of jurisdictional practice for the federal courts. Where jurisdiction rests on diversity of citizenship, the courts must look to the nature of the claim, the certainty of the local law it must apply, the impact of its determination on state policy and precedent, and the implications of the decision for the sound administration of the state and federal relationship. If those special circumstances exist which favor a state resolution of the controversy, the court should abstain and remit the parties to the appropriate state tribunals. Any duplication of judicial effort and expense is outweighed where the substantial considerations of comity and local policy are involved. *See, e.g., England* v. *Louisiana State Board*, 375 U.S. 411 (1964).

In the Court of Appeals' view, "[t]his case presents a novel and important question of insurance law," App. 1a; 633 F.2d at 1213, " . . . not easy to resolve." App. 2a; 633 F.2d at 1214. The court therefore sought an "administratively manageable interpretation" of the policies, based on a "judgment call." App. 11a, 13a; 633 F.2d at 1218. The questions which the court found so difficult, however, were questions of state law. Regulation of insurance is particularly a state function. McCarran-Ferguson Act, 15 U.S.C. § § 1011-1015. This Court has observed that the McCarran-Ferguson Act gives the states primary responsibility for the business of insurance. *See Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979). Significantly, "[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement -- these [are] the core of the 'business of insurance.'" *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969). In both Illinois and New Jersey there are substantial bodies of local law which relate to coverage, burdens of proof and persuasion, and inter-insurer risks. Indeed, the Court of Appeals itself recognized a host of analogous insurance law cases from state courts which "certainly appear to provide support for the manifestation theory." App. 19a; 633 F.2d at 1221.

Rather than proceed to decision in these circumstances, relying "primarily on considerations of policy and result," the Court of Appeals should have abstained. In *Lehman Brothers* v. *Schein, supra,* this Court reviewed the decision of the Second Circuit applying the law of Florida under diversity jurisdiction to shareholders' derivative claims that corporate insiders abused a fiduciary duty in the sale of securities. Finding no controlling Florida law, the Court of Appeals relied on "emanations" from Florida decisions and the preferred policy effect on insiders to support its holding that adequate claims existed under state law. 416 U.S. at 388-89. The decision was vacated by this Court and the question was certified to the Florida courts under the abstention doctrine.

> "Here resort to [certification] would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant state. When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves in this Court, in matters of State law, as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction." 416 U.S. at 391.[7]

Here the Court of Appeals, with no special expertise in New Jersey or Illinois law, was confronted with specific state precedents indicating a manifestation result, and had only a general formulation of state policy to balance against the manifestation decisions. Before deciding a case of such importance, based solely on general policy considerations, the appropriate course would have been abstention, so that the matter could be decided in state declaratory judgment proceedings.[8] As *Lehman Brothers* recognizes, if novel questions are presented and the state law in a distant jurisdiction suggests doubt as to the outcome, the issues are best decided in the first instance by the state courts. That approach assures consistency of results and cooperation within the federal system.

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[7] The history on remand is instructive. The questions of Florida law were answered by the Supreme Court of that state, and the holdings were contrary to the Second Circuit's interpretation. Accordingly, the actions were dismissed. *Schein* v. *Chasen*, 519 F.2d 453 (2d Cir. 1975).

Other circuit courts have properly elected to abstain rather than decide uncertain state law insurance questions which have a broad impact on state policy. In *Smith* v. *Metropolitan Property & Liability Insurance Co.*, 629 F.2d 757 (2d Cir. 1980), the Second Circuit reviewed and affirmed abstention in a diversity action seeking a declaratory judgment on the effect of an exclusionary clause in an automobile insurance policy. The plaintiff had alleged that the exclusion should be restrictively read to provide coverage pursuant to the public policy of Connecticut. Because state law on the issue was uncertain and because Connecticut is an insurance center with a strong interest in the "doctrinal integrity" of its regulatory scheme, the court concluded that the appropriate conditions for abstention existed. 629 F.2d at 760. The Second Circuit's reasoning is equally applicable to the state law question presented here:

> "An erroneous decision as to the validity of the exclusionary clause at issue here — a clause which appears to be in general use . . . — would risk a broad and unwarranted expansion or contraction of coverage going far beyond the private rights at issue here." 629 F.2d at 757.

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[8] Where certification is not available, as apparently is the situation here, the parties are remitted to state court declaratory actions. *Lehman Bros.* v. *Schein*, *supra*, at 390; *Kaiser Steel Corp.* v. *W. S. Ranch Co.*, *supra*, at 594; *Louisiana Power & Light Co.*, *supra*, at 30-31; *Wisconsin* v. *Constantineau*, *supra*, note 6 at 443 (Black, J., dissenting).

By the same token the Court of Appeals should have deferred to the only judicial authorities able to provide definitive formulations of Illinois and New Jersey policy.

Finally, the decision in *Forty-Eight* unquestionably produces a conflict in rules of decision between the state and federal courts. While the burden of proof to show coverage under insurance policies unequivocally rests with the insured under New Jersey and Illinois law, the burden to disprove coverage now rests with the insurer under federal law. App. 28a n.27; 633 F.2d 1225 n.27. That result could have been avoided by abstention, and the failure to do so promotes the type of "irritant in the federal-state relationship" which justifies staying federal court action. *Reetz* v. *Bozanich,* 397 U.S. 82, 87 (1970).

## CONCLUSION

For the foregoing reasons, as well as those set forth in the petitions, *amici* urge this Court to grant the petitions.

Respectfully submitted,

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